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No.—

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page.
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	2
Reasons for granting the writ	9
Conclusion	20
Appendix A	1a
Appendix B	49a
Appendix C	51a

CITATIONS

Cases:

United States v. *Badia*, 490 F. 2d 296 ..... 10, 15, 16
United States v. *Bartee*, 479 F. 2d 484 ..... 10, 15, 16
United States v. *Collier*, 478 F. 2d 268 ..... 10, 14
United States v. *Jobe*, 487 F. 2d 268 ..... 10, 15
United States v. *Larson*, C.A. 9, No. 73–3109, decided May 22, 1974, revised November 21, 1974 ..... 10, 15
United States v. *Leigh*, 487 F. 2d 206 ..... 10, 15, 16

Statutes, rules and regulations:

Controlled Substances Act, Pub. L. 91–513, 84 Stat. 1242, 21 U.S.C. 801 *et seq:*

21 U.S.C. 802(10) 16, 19
21 U.S.C. 802(20) 9, 13, 19
21 U.S.C. 812(b)(2) 2
21 U.S.C. 812(c)(II)(b)(11) 2
21 U.S.C. 822 ..... 9, 19
21 U.S.C. 823(f) 9
21 U.S.C. 824 11
21 U.S.C. 829 ..... 10, 14, 19, 20
21 U.S.C. 841 ..... 6, 7, 9, 11, 14, 17, 18, 20

Statutes rules, regulations, etc.—Continued Page
21 U.S.C. 841(a)..... 7, 8, 9, 10, 13, 14, 15, 16, 17, 19, 20
21 U.S.C. 841(a)(1)..... 2, 9, 14, 15
21 U.S.C. 842..... 6, 7, 10, 11, 13, 14, 17, 19, 20
21 U.S.C. 843..... 6, 7, 13, 17
Harrison Narcotics Act 26 U.S.C. (1964 ed.) 4705(a).. 4
Narcotic Addict Treatment Act of 1974, Pub. L. 93–281, 88 Stat. 124..... 11, 12, 13, 18
2 D.C. Code 131..... 3, 11
21 C.F.R. 306.04..... 19, 20
Miscellaneous:
H. Rep. No. 91–1444, 91st Cong., 2d Sess..... 7, 17
S. Rep. No. 93–192, 93d Cong., 1st Sess..... 12, 18

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 18, 1974 [1] By order of

[1] On November 22, 1974, the court of appeals granted the government's motion for a stay of mandate until December 7, 1974. On December 13, 1974, the court extended its stay until December 17, 1974.

November 14, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a duly licensed physician, registered under the Controlled Substances Act to prescribe and dispense certain controlled substances for legitimate medical purposes, is immune from prosecution under the felony provision of the Act prohibiting the unlawful distribution or dispensation of a controlled substance.

STATUTE AND REGULATION INVOLVED

Because of their length, the pertinent provisions of the Controlled Substances Act (Pub. L. 91–513, 84 Stat. 1242, 21 U.S.C. 801, *et seq.*) and of Title 21 of the Code of Federal Regulations are set forth in Appendix C, *infra*.

STATEMENT

Respondent, a physician, was charged in a 639-count indictment with the knowing and unlawful distribution and dispensation of methadone (dolophine), a Schedule II controlled substance,[2] in violation of 21 U.S.C. 841(a)(1). He was tried by a jury on forty counts of the original indictment and was convicted on twenty-two of those counts. He was sentenced to concurrent

[2] A Schedule II controlled substance is a "drug or other substance [which] has a high potential for abuse * * *, [which] has a currently accepted medical use in treatment * * *," and the abuse of which "may lead to severe psychological or physical dependence." 21 U.S.C. 812(b)(2). See 21 U.S.C. 812(c)(Schedule II)(b)(11).

prison terms of five to fifteen years on fourteen counts, and to concurrent terms of ten to thirty years on the remaining eight counts, the latter group to run consecutively to the former. He was fined a total of $150,000, a special parole term of twelve years was imposed on each count (to run concurrently as to all counts), and his license to practice medicine in the District of Columbia was revoked pursuant to 2 D.C. Code 131.[3]

The evidence at trial established that over a period of six months respondent systematically dispensed methadone in a manner contrary both to the terms of his registration and to any legitimate medical purpose or practice. As respondent admitted at trial, his registration authorized him to dispense methadone only for detoxification purposes in the course of professional practice (Tr. 711–712). Nevertheless, respondent engaged in conduct that the court of appeals later described as "highly irregular practices" (App. A, *infra*, p. 4a):

> 1. He prescribed methadone in whatever quantities the patient requested;
>
> 2. His fees were graduated in accordance with the quantity of methadone prescribed;
>
> 3. He did not make certain that the patients for whom he was prescribing methadone were

[3] 2 D.C. Code 131 provides, however, that an appeal by a defendant from a felony conviction that is the basis for a license revocation "shall act as a supersedeas to the judgment of the court suspending or revoking his license or registration." Presumably, then, Dr. Moore is presently authorized to practice medicine in the District of Columbia despite his conviction in this case.

addicts. Some were not, and some delivered their methadone to non-patients.[4]

Expert testimony at trial established that respondent's "detoxification" treatment was not "consistent with any method * * * throughout the United States that is accepted by the medical profession in this country" (Tr. 396, Testimony of Dr. David H. Fram) [5] and that his fee schedule was "not only not

[4] These conclusions, based on respondent's concessions in his brief in the court of appeals, are supported by respondent's own testimony at trial. See Tr. 682–760. Moreover, respondent's conduct during this period was directly contrary to the provisions of an agreement he had made with the United States Attorney's Office (filed as Appendix A to the Memorandum for the United States in opposition to respondent's application for release from custody, now pending in this Court) following his earlier arrest for violating the Harrison Narcotics Act (26 U.S.C. (1964 ed.) 4705(a)) and his representations to the grand jury in 1970 that he would not engage in certain practices in regard to the prescription of methadone (Tr. 682–684, 688–689).

[5] When given a hypothetical based on the procedures which respondent followed in treating one Herbert Holland, Dr. Thomas E. Piemme said: "That is not acceptable medical practice in any program that I know of anywhere in the country [for either detoxification or maintenance]." [Tr. 450.]

Such treatment involves risks of "[o]verdose death, not only to patients but to others who may inadvertently use it or to whom it may be sold." "There have been instances of small children, one in this city, two years of age, who died from consuming methadone that was left around the house." (Tr. 448–451). Dr. Piemme said that in almost all the well-known programs, whether a patient was being detoxified or maintained, the methadone was always initially administered at the clinic daily under the direct scrutiny of the staff (Tr. 445–447), a practice not followed by respondent.

The doctor also testified that it was commonly accepted medical practice to give an addict a complete physical ex-

acceptable medical practice; that is unethical medical practice" (Tr. 452, Testimony of Dr. Piemme).[6] In short, in pursuing the activities charged,[7] respondent

amination like any other patient (Tr. 447–448). Furthermore, with respect to the doses Holland received, one hundred 10-milligram tablets on a single day, Dr. Piemme said that an addict "[e]ven [with] the largest [heroin] habit one could conceive" would not require more than eighty to one hundred milligrams of methadone a day to "block the euphoria." Patients already addicted to very large doses of methadone "can very quickly, within a matter of a day or two, be brought down to 80 to 100 milligrams of methadone a day and maintained there" (Tr. 459–461). Dr. Piemme saw nothing in the previous hypotheticals that would justify a characterization of the procedures described as "a new, effective, good-faith technique in the treatment, detoxificational cure of an addict" (Tr. 474).

[6] When given a hypothetical based on the fees respondent charged—$15 for a prescription for 50 dolophine tablets, $25 for a prescription for 75 tablets, $35 for a prescription for 100 tablets, and $50 for a prescription for 150 tablets—Dr. Fram said that that was not acceptable medical practice in the District of Columbia: "I would say not. Accepted medical practice is that the physician treats the patient and charges for that. If a prescription is given, that is part of the treatment. What the prescription is or how many pills are given does not determine what the price is." [Tr. 396–397.]

[7] Respondent's operation was of vast magnitude. Between September 1, 1971, and February 11, 1972, 11,169 prescriptions for dolophine tablets written by respondent were filled in the District of Columbia. Of these, 5,486 prescriptions were for 50 tablets each; 1,126 were for 75 tablets; 4,225 were for 100 tablets; 214 were for 150 tablets; 9 were for 200 tablets; 5 were for 300 tablets; and 109 were for miscellaneous quantities. There were 54 days when respondent wrote over 100 prescriptions (Tr. 359–364; Gov. Ex. 22A). Typical of respondent's "patients" was Forris Ensor, who during the period in question received 26 prescriptions from respondent totalling 2,575 dolophine tablets. At first he was told by respondent that he would have to detoxify himself within 21 days, but when he heard nothing further about detoxification, "[he] just kept com-

(Continued)

was not functioning as a medical practitioner but was, as the government argued in the trial court (Tr. VI 83, 92), a trafficker in illegal narcotics.[8]

A divided panel of the court of appeals, while assuming that respondent, "a licensed physician registered to prescribe methadone, acted wrongfully" (App. A, *infra*, p. 7a), reversed his conviction and held that 21 U.S.C. 841 is inapplicable to a physician registered under the Controlled Substances Act. The majority concluded that a physician could only be prosecuted and convicted under those sections of the statute that specifically govern the activities of registrants[9] (*ibid.*) because, the court found (App. A, *infra*, p. 10a):

(Continued)
ing" (Tr. 174–177; Gov. Ex. 5). He went from 5 to 70 dolophines a day without respondent questioning him about the increasing dosages (Tr. 171, 194). Eight other "patients" testified about similar experiences, and respondent himself had difficulty refuting the clear implication of their testimony that he was not a medical practitioner but a narcotics trafficker. For example, when asked where he found the time to consult with his patients on January 5, 1972, when he wrote 271 prescriptions, respondent testified: "One would have to assume from that, right there, that I talked very fast or I write very fast, or possibly both" (Tr. 717).

[8] The dissenting judge in the court of appeals, after detailing the trial evidence at length (App. A, *infra*, pp. 23a–27a), concluded (*id.* at p. 27a):

"Thus, the evidence credited at trial by the jury conclusively establishes that Dr. Moore operated far beyond the pale of accepted medical practice. He clearly did not dispense methadone for detoxification purposes, but rather, quite simply, preyed upon the insatiable cravings of those unfortunate victims he purported to treat solely to get their money. In short, Moore was a drug pusher, a trafficker in illegal narcotics."

[9] 21 U.S.C. 842 and portions of 21 U.S.C. 843.

> Congress intended to deal with registrants primarily through a system of administrative controls, relying on modest penalty provisions to enforce those controls, and reserving the severe penalties provided for in § 841 for those seeking to avoid registration entirely by not registering.

The court rejected the argument of the government, based in part upon language from the House Report (H. Rep. No. 91–1444, 91st Cong., 2d Sess., pp. 10–11), that while Section 842 sets forth "more or less technical violations," which may be committed by registrants only, a registrant may also be prosecuted under Section 841 when his violations are more than merely "technical." Instead, the court held that those in the "legitimate distribution chain" (as opposed to "unauthorized individuals") must always be prosecuted under Section 842 or, in some instances, Section 843 of the Act (App. A, *infra*, pp. 15a–16a).[10]

[10] 21 U.S.C. 842 sets out certain conduct that is unlawful when committed by a registrant, such as the dispensation or distribution of a controlled substance without the written prescription of a practitioner or one not authorized by his particular registration, the failure to keep adequate records, and the like. A violation of that section carries only a civil penalty of a $25,000 fine, except where it can be shown that the violation was committed knowingly, in which case the maximum penalty is a one-year prison term (two years for a second or subsequent offense). 21 U.S.C. 843 penalizes, *inter alia*, distribution of a controlled substance by a registrant without the proper order form from the recipient, use of a fictitious or revoked registration number, acquisition of a controlled substance by misrepresentation, *etc.* A violation of that section carries a maximum prison term of four years (eight years for a second or subsequent violation). In contrast, 21 U.S.C. 841(a) carries a maximum penalty of fifteen years imprisonment.

The dissenting judge concluded that "the terms of the Act, its prior and subsequent legislative history, and plain common sense demonstrate the fallacy of the majority's approach to this case" (App. A, *infra*, p. 20a). He pointed out that in some circumstances a physician, like any other person, may be a drug "pusher" or trafficker" and that the authorization of a doctor to dispense controlled substances for legitimate medical purposes does not absolutely immunize him from prosecution under Section 841(a). In his view, the fatal defect of the majority's decision was its failure to recognize that Section 841

> which excepts authorized conduct does not create a special class of *persons* immune from prosecution for trafficking; rather, it recognizes the legality of the *acts and conduct* of a physician when he dispenses a narcotic drug in good faith for a legitimate medical purpose consistent with the terms of his registration under the Act [App. A, *infra*, p. 20a].

Relying upon the plain language of the statute, the dissent noted that Section 841(a) by its terms applies to "any person," not merely to non-registrants, and that the exception contained in Section 841(a) does not state "except for registrants" but "except as authorized" (*id.* at p. 33a). Since the entire thrust of the Act demonstrates that registered physicians are "authorized" to dispense controlled substances only in the course of their professional practice for a legitimate medical purpose, and since the Act "is replete with provisions that manifest a congressional intent to limit a registrant's authorization to conduct conforming to accepted medical practices"

(*id.* at p. 34a), the dissent concluded that "[w]hen the conduct of a registrant violates this authorized standard he excludes his acts from the exception of [Section 841(a)] and makes himself subject to its penalties" (*id.* at p. 35a).

REASONS FOR GRANTING THE WRIT

This case presents a question of statutory construction that is of substantial importance in the enforcement of the federal narcotics laws. If permitted to stand, the decision of the court of appeals will immunize physicians from prosecution under Section 841(a)(1) of the Controlled Substances Act and will permit them to distribute narcotic drugs for clearly illegitimate purposes solely upon the basis of their statutory authorization to dispense narcotic drugs within the course of their legitimate professional practice.[11] The decision of the court of appeals is not justified either by the plain language or by the legislative history of the Controlled Substances Act. Moreover, it is in conflict with the decisions of all other

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[11] The statutory authorization referred to is Section 822(a) of the Controlled Substances Act, which requires the annual registration of every person "who manufactures, distributes or dispenses any controlled substance." Section 822(b) provides that registrants "are authorized to possess, manufacture, distribute or dispense such substances * * * to the extent authorized by their registration and in conformity with the other provisions of this subchapter." See 21 U.S.C. 822. "Practitioners"—a term which includes physicians (see 21 U.S.C. 802(20))—"shall be registered to dispense or conduct research with controlled substances in schedule II, III, IV, or V if they are authorized to dispense or conduct research under the law of the State in which they practice." 21 U.S.C. 823(f).

circuit courts that have considered the question.[12] The Court should review this case to resolve the conflict and to forestall the serious practical consequences for enforcement of the narcotic laws that may result from this decision.

1. The opinion of the court of appeals significantly undercuts the ability of law enforcement authorities to deal with the ever-increasing problem of narcotic trafficking in the District of Columbia and elsewhere. It permits a physician to sell prescriptions for Schedule II controlled substances in virtually any manner, for unlimited quantities and for any purpose whatsoever without fear of significant legal consequences,[13]

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[12] The First, Fifth and Tenth Circuits have squarely held that physicians may be prosecuted for the unlawful dispensation or distribution of narcotics under the primary felony provision of the Controlled Substances Act, 21 U.S.C. 841(a). See *United States* v. *Badia*, 490 F. 2d 296 (C.A. 1); *United States* v. *Collier*, 478 F. 2d 268 (C.A. 5); *United States* v. *Leigh*, 487 F. 2d 206 (C.A. 5); *United States* v. *Bartee*, 479 F. 2d 484 (C.A. 10); *United States* v. *Jobe*, 487 F. 2d 268 (C.A. 10). The Ninth Circuit, while not directly confronting the issue, has accepted the proposition that a physician may be prosecuted under Section 841(a) when "not acting for a legitimate medical purpose or in the usual course of his professional practice" and, on the authority of *Badia* and *Collier*, recently affirmed the conviction of a physician for having violated that statute. *United States* v. *Larson*, C.A. 9, No. 73–3109, May 22, 1974, revised November 21, 1974, slip op., p. 4.

[13] While both the majority and the dissent suggest that the sale of such prescriptions would constitute a violation of the relevant misdemeanor provision of the Controlled Substances Act, 21 U.S.C. 842(a)(1), it is unclear whether that is so. That section proscribes the distribution or dispensation of a controlled substance in violation of 21 U.S.C. 829, which in turn prohibits the dispensation of a controlled substance "without the written

so long as he is registered under the Controlled Substances Act. Moreover, the Act does not even permit the revocation or suspension of a physician's registration to distribute or dispense controlled substances or of his license to practice medicine unless he is first convicted of a felony,[14] a virtual impossibility under the court of appeals decision.[15] The result is that unscrupulous physicians will be able to profit by selling or prescribing controlled substances to narcotics dealers or addicts, who will themselves either illegally abuse

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prescription of a practitioner." Despite the view of the dissenting judge—that respondent's words on an order form constituted "a fictitious prescription" because it was not issued for a valid medical purpose (App. A, *infra*, p. 36a, n. 10)—that analysis affords an uncertain foundation on which to bottom a criminal prosecution. It would, in fact, be difficult to square a conviction for such a violation with the reasoning of the court below in the instant case, in light of the fact that there would not even be a violation of the literal language of the statute. Moreover, while it may be that respondent committed violations of other subsections of 21 U.S.C. 842, such as the failure to keep adequate records (21 U.S.C. 842(a)(5)), the sale of prescriptions—clearly a more serious offense—would go unpunished under the court's opinion.

[14] See 21 U.S.C. 824(a)(2); 2 D.C. Code 131.

[15] The recently enacted Narcotic Addict Treatment Act of 1974, Pub. L. 93–281, 88 Stat. 124, expands the discretion of the Attorney General to suspend or revoke registrations by amending 21 U.S.C. 824. However, the fact that the Controlled Substances Act, as originally enacted, permitted revocation only upon conviction of a felony, persuasively suggests that Congress from the start intended the felony provisions of Section 841 to be applicable to registrants acting outside the course of professional practice; otherwise, physicians who trafficked in narcotics could not have had their registrations revoked. The dissent took note of this anomaly flowing from the majority opinion (App. A. *infra* pp. 39a–40a).

the drugs or distribute them to other addicts for profit.

Particularly as methadone maintenance and detoxification programs have become recognized forms of treatment for heroin addicts, a need has been felt to assure that methadone—itself a narcotic as addictive as heroin or morphine—is not indiscriminately distributed without controls to those who may seek to maintain their addiction through a cheaper and more readily available heroin substitute or themselves to distribute methadone to other addicts. See S. Rep. No. 93–192, 93d Cong., 1st Sess., pp. 4–6. "Methadone programs can become a lucrative enterprise" (*id.* at 8) for the unscrupulous licensed physician who, armed with his medical degree and prescription pad, literally sells narcotics or prescriptions for profit.[16] While

[16] Even the Senate of the United States has recognized respondent as such an individual. As it noted during its consideration of the Narcotic Addict Treatment Act of 1974:

"In some communities, one or more physicians have contributed substantially to the illicit traffic in methadone. * * * One of the most notorious cases is that of Dr. Thomas Moore who operated a 'methadone program' in the District of Columbia until his final conviction of illegal distribution of methadone on an indictment alleging 38 separate counts. Moore operated from his office with impunity for over two years during which time drugs obtained by addicts from him were often found in the illicit traffic and believed to be involved in cases of narcotic overdose deaths.

"He allegedly charged from $15 for 50 tablets to $75 for 200 tablets to the several hundred addicts who obtained their drugs weekly in this fashion. It was alleged that he sold 11,000 prescriptions—815,000 10 mg. units—and accumulated more than a quarter of a million dollars for his efforts. Even under these circumstances, it was still possible for the alleged 'patients' to make sales of the methadone tablets for profit." [S. Rep. No. 93–192, *supra*, at 7.]

the Narcotic Addict Treatment Act of 1974 provides additional safeguards to insure the effective operation of methadone programs and to protect against the introduction into the community of yet another narcotic of abuse and addiction, it also seems clear that supervision of narcotic treatment programs utilizing methadone or other addictive substances would be seriously compromised by the inability to prosecute physicians for their felonious distribution of these drugs.[17]

Moreover, the holding of the court of appeals is not limited to physicians. It extends to all persons in the "legitimate distribution chain" (App. A, *infra*, p. 15a), that is, "registrants" under the Act. According to the court, such persons may never be prosecuted under Section 841(a), which provides a prison term of up to fifteen years for unlawful distribution, and must instead be charged under Section 842 or, in some instances, Section 843. The persons excluded by the majority from felony prosecution include all those whom the Act defines as "practitioner[s]"—physicians, dentists, veterinarians, scientific investigators, pharmacies, hospitals or other persons licensed, registered or otherwise permitted to dispense, distribute or administer a controlled substance. See 21 U.S.C. 802(20). Thus, for example, an unscrupulous

[17] On November 11, 1974, for example, on the basis of the opinion in the instant case, United States District Judge Thomas A. Flannery dismissed without prejudice a 35-count indictment against another District of Columbia physician charged with violations of 21 U.S.C. 841(a). *United States* v. *Andrew F. Burton*, D.D.C., No. 596–74.

pharmacist who sells narcotics to addicts would be immune from felony prosecution under Section 841(a) and could be charged only with the distribution of a controlled substance without the written prescription of a physician, a one-year misdemeanor. See 21 U.S.C. 829, 842(a)(1), As we show, *infra,* pp. 16–19, Congress never intended such a result.

2. The result reached by the court of appeals conflicts with the decisions of the other courts of appeals that have considered the issue whether a registrant may be convicted under Section 841(a)(1) when he issues prescriptions that cannot properly be viewed as a legitimate part of a regular medical practice. The Fifth Circuit in *United States* v. *Collier,* 478 F. 268, 271–272, announced the correct standard for judging what is in the usual course of a physician's professional practice and, unlike the opinion of the court in the instant case, expressly limited a registrant's immunity from prosecution under Section 841 to such conduct:

> It is apparent that a licensed practitioner is not immune from the act solely due to his status [citation omited], but rather, because he is expected to prescribe or dispense drugs within the bounds of his professional practice of medicine. A physician is restricted to dispensing or prescribing drugs in the bona fide treatment of a patient's disease, including a dispensing of a moderate amount of drugs to a known addict in a good-faith attempt to treat the addiction or to relieve conditions or suffering incident to addiction [citations omitted]. However, under the guise of treatment a physician cannot sell drugs to a dealer nor distribute drugs intended to cater to cravings of an addict [citations omitted]. Congress did not intend for doctors to become drug pushers.

See also *United States* v. *Leigh,* 487 F. 2d 206, 207 (C.A. 5); *United States* v. *Bartee,* 479 F. 2d 484, 488 (C.A. 10); *United States* v. *Jobe,* 487 F. 2d 268, 269 (C.A. 10). Cf. *United States* v. *Larson,* C.A. 9, No. 73–3109, decided May 22, 1974, revised November 21, 1974.

In *United States* v. *Badia,* 490 F. 2d 296, the First Circuit explicitly held that the "combined effect" of the statutory definitions of "dispense" and "practitioner" "is to limit the meaning of 'dispense' to delivery of controlled substances by a physician who is acting in the course of professional practice or research" and to make delivery by a physician otherwise punishable under section 841(a)(1) (*id.* at 298–299):

> Delivery of controlled substances outside the course of professional practice or research would constitute "distributing," *see* 21 U.S.C. § 802(11) (1970), an activity which violates § 841(a)(1) even if carried on by a registered physician. * * *
>
> * * * [A]ppellant's conduct bore no more resemblance to professional medical practice than the conduct of any streetcorner "pusher." A medical degree confers no immunity from criminal punishment.[18]

[18] While the First, Fifth, Tenth and (by implication) Ninth Circuits all agree that a physician may be prosecuted under 21 U.S.C. 841(a), there is disagreement among them concerning whether a physician should be charged with "distributing" or with "dispensing," both of which are proscribed by Section (Continued)

565-411 O - 74 - 2

We believe it is both appropriate and most important to law enforcement that this Court resolve the conflict between these decisions and the decision of the District of Columbia Circuit in the instant case.

3. Finally, we submit that the decision of the court of appeals was erroneous. The statute at issue, 21 U.S.C. 841(a), provides in pertinent part:

> *Except as authorized* by this subchapter, it shall be unlawful for *any person* knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense * * * a controlled substance; * * *. [Emphasis supplied.]

(Continued)
841(a). The Fifth and Tenth Circuits are of the view that a physician must be charged with "dispensing." See *United States* v. *Leigh*, *supra*; *United States* v. *Bartee*, *supra*. The First Circuit, on the other hand, has held explicitly that a registered physician may be charged only with "distributing" since, in its view, the statute defines "dispensing" as a lawful act when done by a person registered under the statute (see 21 U.S.C. 802(10)). In *United States* v. *Badia*, *supra*, 490 F. 2d at 298, n. 4, that court, noting that its interpretation conflicted with the recent decision of the Fifth Circuit in *Leigh*, stated:

"We think the reason Congress included the term 'dispense' in § 841(a)(1) was to compel physicians to become properly licensed. If not licensed, a physician could then be convicted of unlawful dispensing. However, once licensed, he could not be convicted of unlawful dispensing because, as we stated above, the statute defines the term in and of itself as a lawful act. It should also be noted that *Leigh* seemingly conflicts with the prior Fifth Circuit decision in *Collier*, *supra*, where the court affirmed a physician's plea of guilty to unlawfully 'distributing' controlled substances in violation of § 841(a)(1)."

While we believe the view of the First Circuit is the more logical, and that physicians properly should be charged with unlawful "distribution," the conflict between the circuits on this point is not relevant here because respondent was indicted, tried and convicted for having "knowingly and unlawfully distributed and dispensed" controlled substances.

As the dissent pointed out, the statute by its terms applies to "any person," not merely to those who have failed to register, and the exception does not state "except for registrants," but "except as authorized" (App. A, *infra* p. 33a). "There is thus no expressed intent in the language of [21 U.S.C. 841(a)] absolutely to immunize registrants, or any *person*, from prosecution under its terms" (*ibid.*); the exception is not for a particular type of person but for a particular type of conduct, namely, that which is "authorized," a term that derives its meaning from other sections of the Act. The dissent thus was correct in observing that Section 841(a) "excepts authorized conduct" but does not

> create a special class of *persons* [registrants] immune from prosecution for trafficking; rather, it recognizes the legality of the *acts and conduct* of a physician when he dispenses a narcotic drug in good faith for a legitimate medical purpose consistent with the terms of his registration under the Act. [App. A, *infra*, p. 20a] [emphasis in dissenting opinion.]

The penalty provisions of the Act focus upon conduct rather than the actor's status as a registrant. Sections 841 through 843 define various offenses that may be committed by "any person" and range from acts wholly outside the protection of the Act (Section 841) to acts characterized by Congress as "[m]ore or less technical violations"[19] of the registration scheme (Section 842 and, in large part, Section 843). Penalties are graduated accordingly.[20] Taken together, these pro-

[19] H. Rept. No. 91-1444, *supra*, 91st Cong., 2d Sess., p. 10.
[20] See note 10, *supra*.

visions reflect a congressional intent to encourage registration by imposing modest penalties for violations more or less dependent upon registration.

But the statutory scheme reveals no intention to permit registration to confer immunity for the trafficking proscribed by Section 841. On the contrary, as the dissent observed (App. A, *infra,* pp. 34a–35a), it is consistent with the "entire thrust" of the Act to limit a registrant's authorization to conduct conforming to legitimate medical practices. That emphasis of the Act is borne out by the fact that, since its passage, Congress's sole concern with prosecution of physicians under Section 841 has been with claims that "unorthodox" methods of treatment were legitimate medical practice [21]—a claim it expressly did not fear from respondent.[22] To assert, however, that Congress's original intention was to exempt registrants as a class from the reach of Section 841 is both illogical and unsupported by the language of the Act.

To be sure, a medical practitioner may be authorized to dispense certain narcotic drugs, and the Act defines the term "practitioner" to mean a "physician [and other professional persons] * * * registered * * * to * * * dispense * * * a controlled substance *in*

[21] This was an impetus for passage of the Narcotic Addict Treatment Act of 1974. See S. Rep. No. 93–192, *supra*, pp. 3–4, 11–14.

[22] See note 16, *supra;* S. Rep. No. 93–192, *supra*, pp. 7, 13–14.

the course of professional practice * * *." 21 U.S.C. 802(20) (emphasis supplied). 21 U.S.C. 822 provides for the registration of practitioners and others. However, only a physician or other practitioner who is registered (or otherwise authorized) and acting "in the course of professional practice" may dispense controlled substances; for " 'dispense' means to deliver a controlled substance to an ultimate user * * * by * * * a *practitioner,* including the prescribing and administering of a controlled substance." 21 U.S.C. 802(10) (emphasis supplied). A physician who distributes drugs outside the course of professional practice, however, is to that extent not a practitioner under the Act and is thus within the reach of Section 841(a) even though he is registered under the Act. See *United States* v. *Badia, supra* 490 F. 2d at 298–299.[23]

[23] The reasoning of the court below does not adequately support a contrary construction of the statute. As we understand its opinion, it rested in large part on the court's interpretation of the relation between the Act and 21 C.F.R. 306.04(a), which served as a "bill of particulars" in this case (Tr. 8–9; App. A, *infra*, pp. 5a–6a, 10a). The regulation provides that a prescription for a controlled substance must be issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" and that an order "purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription * * ." The court of appeals, noting that Part 306 provides regulations governing 21 U.S.C. 829 (Prescriptions), violations of which are expressly punishable under Section 842(a)(1) of the Act, concluded that "it cannot have been evident to appellant that he would also be punishable under § 841(a), which makes no ref-

(Continued)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1974.

(Continued)
erence to § 829 or the obligations which it imposes on registrants" (App. A, *infra*, p. 10a). But Section 841(a) makes no reference to Section 829 because the latter, like the other sections governed by Section 842, involves formal requirements of the registration scheme, while Section 841 punishes acts entirely outside the authorization of the statute, *i.e.*, trafficking. Section 841(a), read in conjunction with the statutory definitions of "dispense" and "practitioner", makes clear that one issuing a prescription outside the course of professional practice is punishable under that section, although, in the view of the court of appeals, he may also be violating Section 829. 21 C.F.R. 306.04(a) simply underscores that a prescription so issued "is not a prescription within the meaning and intent of section * * * 829" and is thus beyond the protection of that section; it does not limit punishment to the civil or misdemeanor penalties of Section 842.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1192

UNITED STATES OF AMERICA

v.

THOMAS W. MOORE, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. No. Criminal 1350-72)

Decided October 18, 1974

Raymond W. Bergan, for appellant. *Edward Bennett Williams* and *Steven M. Umin*, were on the brief for appellant. *John Kuhns* also entered an appearance for appellant.

Peter C. Schaumber, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry* and *Vincent R. Alto*, Assistant United States Attorneys, were on the brief for appellee.

Before: BAZELON, *Chief Judge*, MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* BAZELON.

Dissenting Opinion filed by *Circuit Judge* MACKINNON.

BAZELON, *Chief Judge*: Appellant, a licensed physician, was registered under § 822 of the Controlled Substances Act [1] to prescribe methadone. He was convicted of violating § 841 of the Act, which forbids prescriptions without authorization. We find § 841 inapplicable to appellant and reverse his conviction.

Our conclusion is reached by force of the established principle that "when a choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." [2] This rule, of course, cannot serve to "override . . . evident statutory purpose." [3] In the search for an "evident statutory purpose," our analysis necessarily covers a complex maze of statutory language, regulatory provisions, and previous legislation.

I

Methadone is an addictive drug which can be used in the treatment of narcotics addiction.[4] A heroin addict who switches to methadone may experience neither a craving for heroin nor a euphoric "high." Moreover,

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[1] All sections of the Controlled Substances Act referred to in the opinion are reproduced in Appendix I *infra*. References are to section numbers of the Act as codified, 21 U.S.C. §§ 801 *et seq.*

[2] United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

[3] United States v. Brown, 333 U.S. 18, 25 (1948).

[4] The brief description which follows of the nature and use of methadone is based on expert testimony given at appellant's trial. *See* Transcript Volume II [hereinafter "Tr. II"] at 337-424; Vol. III at 435-474; 551-574.

methadone can be taken orally once a day, while heroin must often be injected several times a day.

There are two general approaches to the use of methadone in treating addicts—maintenance and detoxification. Under a system of maintenance, a large dose of methadone is given once a day for an indefinite period in order to keep the patient from taking heroin. In detoxification, the less controversial approach, a large dose of methadone is given for the first few days in order to keep the patient free of withdrawal symptoms. The dose is then gradually reduced, ultimately to achieve abstinence from all drugs.

The evidence at appellant's trial established that from August, 1971 to February, 1972 appellant prescribed methadone to numerous patients. Under the Controlled Substance Act only those doctors who have obtained registration from the Attorney General can prescribe a "controlled substance" such as methadone.[5] Appellant had obtained such registration for the period in question and it was never revoked during that period.

Appellant contended at trial that he prescribed methadone in good faith for detoxification.[6] The government argued that appellant was no more than a "pusher":

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[5] 21 U.S.C. § 822(b), Appendix I *infra*. § 812 divides controlled substances into five "schedules" based on the drug's potential for abuse, accepted medical use and the like, Methadone is a schedule II drug. *See* 21 U.S.C. § 812(c), Schedule II(b)(11). For the properties of a schedule II drug, see § 812(b)(2), Appendix I *infra*.

[6] Tr. IV at 649. Appellant testified that he prescribed large quantities of methadone to achieve a "blockade" condition in his patients, so that heroin would have no impact, and to create a psychological condition of great desire for drug detoxification. He said his approach was inspired by the work of a British practitioner. *See* Tr. III at 575 *et seq.*

> [H]e used the physician's cloak as a cover to sell drugs . . . There was no medical purpose behind this—there was only one purpose: money.[7]

As appellant concedes in his brief to this court,[8] the evidence at trial established that he engaged in certain highly irregular practices during the period in question:

> 1.) He prescribed methadone in whatever quantities the patient requested;
>
> 2.) His fees were graduated in accordance with the quantity of methadone prescribed;
>
> 3.) He did not make certain that the patients for whom he was prescribing methadone were addicts. Some were not, and some delivered their methadone to non-patients.

In a 639-count indictment filed June 27, 1972,[9] appellant was charged with violating § 841(a) of the Controlled Substances Act:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to . . . distribute or dispense [that is, prescribe] . . . a controlled substance.[10]

When appellant was arraigned, the trial judge told the prosecutor that the theory of the government's case would have to be spelled out in greater detail since "the

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[7] Tr. VI at 83, 92.

[8] Appellant's Brief at 4-5.

[9] On September 26, 1972 the Government announced its intention to sever 588 counts. A retyped forty-count indictment was subsequently accepted by the court for filing.

[10] *See also* 21 U.S.C. § 802 (10) Appendix I *infra*.

indictment doesn't tell the defendant anything."[11] Accordingly, at a pre-trial hearing government counsel offered an oral bill of particulars. Counsel noted that pursuant to a provision in the Controlled Substances Act the Attorney General had promulgated regulations governing those registered to prescribe controlled substances.[12] The government relied on appellant's alleged violation of one of those regulations:

> [Government Counsel]: [T]he Government would rely on the Section numbered 306.04. And, the two main sections or the two main parts of that section that apply to this case, that is, the specific theories of the Government's case, is section (a) which states in part: "A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner, acting in the usual course of his professional practice."
>
> It is the Government's contention and theory that the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and secondly, that he was not acting in the usual course of his professional practice.
>
> The second aspect of that regulation is part (c), which states in part: "A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the purposes of continuing his dependence upon such drugs."
>
> It is the Government's contention that these prescriptions were issued to maintain these drug addicts as drug addicts, and that he was not issuing these prescriptions to detoxify them, but retaining them as drug addicts.

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[11] Supplemental Transcript, July 13, 1972, at 7.

[12] Tr. I at 7.

So, that really boils down to the end result of what I stated, that he was conducting methadone maintenance or maintaining drug addicts rather than detoxifying them as he was only authorized to do by his regulations, and by his violation of these regulations he violated 841(a) of the CSA.

THE COURT: I will take that statement which you made, Mr. Alto, in the nature of a Bill of Particulars, and limit your proof accordingly, and it will be of notice to [defense counsel] as to the theory of the case.

[Government Counsel]: Yes, your Honor.[13]

Appellant's trial commenced on October 17, 1972. After the prosecution rested, the defense moved for a judgment of acquittal, noting that the government had failed to establish that appellant was not authorized to write prescriptions for methadone. The motion was denied. After the defense rested, the court, in keeping with the government's theory of the case, instructed the jury that it had to find:

> beyond a reasonable doubt that a physician who knowingly or intentionally did dispense or distribute [methadone] by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States.[14]

The jury returned a verdict of guilty on 22 counts. Appellant was sentenced to prison terms of five to fifteen years on each of fourteen counts, all to run concurrently, and ten to thirty years on each of the remaining eight counts, to run concurrently to each other but consecutively

[13] *Id.* at 8-9.

[14] Transcript of October 20, 1972, at 143-144.

to the first set of sentences. Fines totalling $150,000 were also imposed.[15]

II

Appellant contends that his indictment must be dismissed because § 841 of the Controlled Substances Act does not apply to doctors registered to dispense methadone. He argues that if he acted unlawfully he was subject to trial only under those sections of the statute which specifically govern the activities of registered doctors—sections with less severe penalties than those in § 841. This contention is the only one we address. We do not decide under what circumstances, if any, an individual such as appellant could lawfully administer a methadone maintenance program. Nor do we decide whether appellant was in fact maintaining addicts, detoxifying them, or simply pushing drugs. We may assume that appellant, a licensed physician registered to prescribe methadone, acted wrongfully. We are only concerned with the consequences of such action.

There is support in the language and history of § 822 of the Act for appellant's contention that § 841 does not apply to him. § 822(b) specifically provides that persons registered by the Attorney General to dispense controlled substances are "authorized [to do so] to the extent authorized by their registration and in conformity with the other provisions of this subchapter." The language echoes the "except as authorized" language of § 841, suggesting immunity for registrants from the penal sanctions provided for in that section. Of course, that a registrant is "authorized . . . to the extent authorized" lends some credence to a theory that Congress did not intend authorization for registrants to extend beyond com-

[15] Appellant's license to practice medicine in the District of Columbia was also revoked pursuant to 2 D.C. Code § 131. Tr. VI at 1002.

pliance with the other provisions of the Act and the regulations promulgated thereunder.

The legislative history of § 822, however, weighs against such a theory. The Act, as it was originally passed by the Senate,[16] did not contain a section comparable to § 822(b). The provision was inserted by the House Committee on Interstate and Foreign Commerce, which flatly stated in its report that the purpose of the addition was "to make clear that persons registered under this title are authorized to deal in or handle controlled substances."[17] The Committee's explanation contains no suggestion that it intended to authorize only registrants who complied in every way with responsibilities established under other sections of the Act.[18]

Appellant's reading of § 841 gathers further support from its place in the overall scheme of the Act. The Act insures the close regulation of registrants. Section 822(f) gives the Attorney General authority to inspect the offices of registrants. Standards and procedures are set forth in § 824 for revoking or suspending an individual's registration; revocation and suspension, as tools for the administrative control of the flow of drugs, have recently been strengthened by the passage of the

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[16] S. 3246, 91st Cong., 2d Sess. (1970). The Act passed the Senate on January 28, 1970. 116 CONG. REC. 1671.

[17] H.R. REP. No. 91-1444, 91st Cong., 2d Sess. 38 (1970).

[18] The Committee's report does suggest that registrants' authorization is limited to what their *registration* authorizes them to do. *Id.* But even if this suggestion is taken as clarifying Congress' intent on this point, the prosecution's theory of the case did not rest on the appellant's violation of the terms of his registration, but much more broadly on his alleged activities outside the "usual course of practice." *See* text accompanying note 13 *supra*; Brief for Appellee at 61.

Narcotic Addict Treatment Act.[19] Under §§ 828 and 829, requirements are detailed for the proper order forms and prescriptions in the distribution or prescription of drugs.

This administrative machinery is backed up by the penalties provided for in §§ 842 and 843. § 842 outlaws issuing prescriptions in violation of § 829, mislabelling drugs and similar misconduct. Violators of § 842 are subject to a civil penalty of $25,000 and, if a violation is knowing, a criminal penalty of a year imprisonment

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[19] Act of May 14, 1974, Pub. L. No. 93-281, 84 Stat. 1242.

That Act amended §§ 822 and 824, which provides for the revocation and suspension of registrations. It requires a special registration for practitioners administering maintenance or detoxification programs and authorizes the Attorney General to revoke this registration for failure to meet standards which he is authorized to promulgate. The dissent contends that the legislative history of NATA refutes our reading of § 841. The case of Dr. Moore is discussed in the Senate Report on NATA as a "most notorious" example of the diversion of drugs for illicit use and sale by a registered practitioner, and his conviction and the length of his sentence are noted with apparent approval. S. REP. No. 93-192, 93 Cong., 1st Sess. 7 (1973).

NATA, of course, was passed after this appeal had been briefed and argued in our court, and there is a question therefore as to how much its history can be relied on in meeting appellant's arguments. In any event, it seems to us that Congress' approbation of Dr. Moore's conviction is not strong evidence of its purpose in passing § 841, which incidentally was enacted some four years earlier by a differently constituted Senate and House. Section 841, in fact, is not considered in the Senate or House Reports on NATA, and with good reason, for Congress' central concern in the passage of that Act was not criminal prosecutions at all but the deregistration of abusers. The step which it took is perfectly consistent with the view that its broad intent, from the outset, was to deal with registrants through administrative controls rather than the harsh penal provisions of § 841.

and a fine of $25,000. § 843 defines more serious offenses for registrants, such as distributing a controlled substance when there is no proper order form and using a fictitious registration number. Violations are punishable by four years' imprisonment and a $30,000 fine.

In contrast to §§ 842 and 843, § 841 does not mention "registrants" as the focus of any of its provisions. It provides for sentences of up to 15 years and fines of up to $25,000. This broad outline strongly suggests that Congress intended to deal with registrants primarily through a system of administrative controls, relying on modest penalty provisions to enforce those controls, and reserving the severe penalties provided for in § 841 for those seeking to avoid regulation entirely by not registering.

As already noted, the regulations which served the Government as a bill of particulars in appellant's trial appear in § 306.04 of the regulations implementing the statute. Part 306 is specifically limited to:

> [r]ules governing the issuance, filling, and filing of prescriptions pursuant to . . . 21 U.S.C. § 829 . . . .[20]

Punishment for violation of § 829 is specifically provided for in § 842. Against the statutory background which we have sketched, it cannot have been evident to appellant that he would *also* be punishable under § 841(a), which makes no reference to § 829 or the obligations which it imposes on registrants.[21]

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[20] 36 Fed. Reg. 7799 (1971).

[21] We need not and do not decide whether § 306.04 of the regulations is sufficiently specific for the invocation of criminal sanctions, nor whether Congress intended that violations of regulations trigger criminal prosecutions under the Controlled Substances Act.

III

The government seeks to justify its prosecution of appellant by reference to judicial construction of the Harrison Narcotic Act of 1914,[22] the predecessor of the Controlled Substances Act. In order to evaluate this contention we must consider the structure of the Harrison Act. Section 1 required that persons selling or prescribing certain narcotics register with the "collector of internal revenue of [their] district" and pay an annual tax. Section 2 made it unlawful to sell or prescribe narcotics except to persons with order forms issued by the Commissioner of Internal Revenue. Section 2 exempted the prescribing "of any of the aforesaid drugs to a patient by a physician . . . regularly registered under this act in the course of his professional practice only . . ." All violations of the Act were punished under Section 9 by imprisonment of up to five years and fines of up to $2,000.

The government notes that under court decisions construing the Harrison Act a physician could lose his exemption from Section 2 by distributing drugs in an unprofessional manner.[23] They refer to decisions such as *Jin Fuey Moy* v. *United States*, in which the Supreme Court held in 1920 that:

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the

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[22] 38 Stat. 785. Sections of the Harrison Act referred to in the opinion are reproduced in Appendix II, *infra*.

[23] The government cites cases such as United States v. Behrman, 258 U.S. 280 (1921); United States v. Doremus, 249 U.S. 86 (1919); Linder v. United States, 268 U.S. 5 (1925). *See* Appellee's Brief at 61-63.

565-411 O - 74 - 3

act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfying the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it.[24]

The government maintains that the foregoing principles are "analogously dispositive" [25] and dictate that under the Controlled Substances Act appellant was stripped of his exemption from § 841 by his unprofessional conduct.

The Controlled Substances Act, however, is fundamentally different from the Harrison Narcotic Act. Indeed, as its legislative history indicates, the Controlled Substances Act replaces the Harrison Act's single penalty provision with a series of penalty provisions specifically designed to treat registered and unregistered individuals differently.

The penalty provisions now embodied in §§ 841, 842, and 843 of the Controlled Substances Act were first before Congress when the Senate considered the Controlled Dangerous Substances Act of 1969. §§ 501-503 of the Senate bill [26] contained the identical offenses as §§ 841-43: § 501 outlawed drug dealing by those not "authorized" under the Act; § 502 prohibited, *inter alia*, actions by registrants which violated the "prescriptions" section; [27] and

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[24] 254 U.S. 189, 194 (1920).

[25] Appellee's Brief at 23.

[26] S.3246, 91st Cong., 2d Sess. (1970), is reproduced at 116 CONG. REC. 1671 (1970). Relevant portions of §§ 501-503 of the Senate bill are reproduced in Appendix III *infra*.

[27] *See also* § 309 of the Senate bill, detailing requirements for prescriptions, reproduced in Appendix III *infra*. Its language is comparable to the current language in 21 U.S.C. § 829.

§ 503 prohibited, *inter alia*, distribution by registrants in the absence of proper order forms. The relative severity of the penalties was also identical to the present Act: the most severe penalty was for violation of § 501, the least severe for violation of § 502.

The Judiciary Committee's Report on the Senate bill states that while § 501 applies to "traffickers," [28] § 502 contains "penalties . . . for those involved in the legitimate drug trade," [29] and § 503 contains "further penalties . . . for registrants for illegal distribution of [controlled] drugs . . ." [30] The Section-By-Section Analysis in the Report states that § 502 makes it unlawful to prescribe a controlled substance "contrary to the terms of registration requirements," [31] and § 503 makes it unlawful to distribute controlled substances "contrary to registration requirements and contrary to order forms established by the Attorney General." [32]

Thus it was clear at the time of the Senate Report that §§ 502-503 (§§ 842-843) were designed to regulate registrants—those within the legitimate drug business—while § 501 (§ 841) was for those outside of legitimate channels. The debate on the floor of the Senate confirms this view. Senator Dodd, the manager of the bill and chairman of the relevant subcommittee, noted that §§ 502-

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[28] S. REP. No. 91-613, 91st Cong., 1st Sess. 8 (1969). The penalty described establishes that § 501 is under discussion. This method of identification is used when necessary in the discussion of legislative history which follows.

[29] *Id.* at 9.

[30] *Id.*

[31] *Id.* at 25.

[32] *Id.*

565-411 O - 74 - 4

503 provided penalties "for those involved in the legitimate drug trade." [33] Senator Hruska, a leading proponent of the bill and a member of Senator Dodd's subcommittee, emphasized that the Harrison Act was outdated.[34] He explained that in the Senate bill "we are not merely redecorating the existing legal structure. Rather we have laid a new foundation . . ." [35] Senator Hruska further noted that in the Senate bill "the penalties are tailored to fit the crime and the person who com-

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[33] 116 CONG. REC. 997 (1970) (remarks of Senator Dodd).

Senator Dodd was chairman of the Juvenile Delinquency Subcommittee of the Judiciary Committee—the subcommittee that held hearings on narcotics legislation.

[34] *Id.* at 975 (remarks of Senator Hruska):

> Insofar as the enforcement of the drug laws of America are concerned, as they exist now, we know that basically the sanctions and penalties for the illegal acts are pretty much based on a law that is almost 60 years old, the Harrison Narcotic Act.
>
> In the tenure of both the Senator from Connecticut and this Senator we have witnessed various amendments that have been made to that basic law, particularly in the field of penalties and penology, as well as some new substances. These were very unsatisfactory. It must be brought up to date, and it has to be modernized to include many new substances and substances considered dangerous and not yet in use, which will develop as time goes on. Then, there must be some scheme or system of penalties for those who do not obey regulations and the requirements of the statute and other things covered in the bill.
>
> Other features in the bill would include distribution, dispensing, importation, exportation, as well as administrative provisions and enforcement provisions. We have to have most of these things, virtually all of them, in order to write an immediate and effective law enforcement statute.

[35] *Id.* at 1663.

mitted that crime." [36] He described § 501 as applying to "traffickers," [37] and §§ 502 and 503 as defining "offenses committed by registrants." [38]

On January 28, 1970, the Controlled Dangerous Substances Act passed the Senate. The House then held hearings in the field. On September 10, 1970, the House Committee on Interstate and Foreign Commerce reported out the bill which became the present Act.[39] The three penalty provisions passed by the Senate were retained in the House bill.[40] The House Committee's Report emphasized the unique structure of the proposed legislation:

> The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers and all others in the legitimate distribution chain, and makes transactions outside the legitimate chain illegal.[41]

Thus the House Committee was aware, as the Senate was, of a distinction between § 841, which covers unauthorized individuals, and §§ 842 and 843, which cover those in the "legitimate distribution chain." The House Report notes that "more or less technical violations" are set forth in § 842 [42]—there is no comparable explana-

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[36] *Id.* at 1664.

[37] *Id.* at 1665.

[38] *Id.*

[39] H.R. REP. No. 91-1444, *supra*.

[40] In the House bill, H.R. 18583, they are numbered §§ 401, 402, and 403. *See* H.R. REP. No. 91-1444, *supra* at 46-48. They are the same as the Senate provisions for purposes relevant to this appeal.

[41] H.R. REP. No. 91-1444, *supra* at 3.

[42] *Id.* at 10-11 ("More or less technical violations set forth in Section 402 [§ 842] of the bill are punishable by less severe penalties.")

tory phrase concerning § 841 or § 843. We find no merit in the government's view that this phrase mandates that appellant be tried under § 841 since his violations were not "technical." At most, the phrase might indicate that § 843, which has more severe penalties than § 842, be used for certain serious offenses committed by those within the legitimate distribution chain. In any event, the phrase "more or less technical violations" is hardly self-explanatory—the penalty for a knowing violation of § 842 includes a year imprisonment, implying that Congress was concerned with serious misbehavior.[43]

The House Report provides further support for the view that the Controlled Substance Act fundamentally revises the penalty structure of the Harrison Act. The Report, in its discussion of the need for medical treatment for narcotics addicts,[44] cites with approval the reports of two Presidential Commissions—the Prettyman Commission of 1963 [45] and the Katzenbach Commission of 1967.[46] Both Commissions noted the difficulties physicians faced under the Harrison Act, where a controversial drug prescription for a patient could result in a doctor being punished as a pusher.[47] The House Report quoted at

[43] After passage by the House, the bill returned to the Senate, where Senator Hruska expressly noted during floor debate that the penalty structure was the same as in the original Senate bill he had supported. 116 CONG. REC. 3502-03 (remarks of Senator Hruska). The same penalty structure was retained as the bill went through conference, finally passed both Houses, and was signed by the President.

[44] H.R. REP. 91-1444, *supra* at 14-15.

[45] The President's Advisory Commission on Narcotics and Drug Abuse, *id.* at 16.

[46] President's Commission on Law Enforcement and Administration of Justice, *id.*

[47] For the observations of the Katzenbach Commission, see Task Force Report, Narcotics and Drug Abuse, the President's Commission on Law Enforcement and Administration of Justice (1967), at 18-19:

> What limits does the law set on the right of a physician to prescribe or administer narcotic drugs to a narcotic addict? This short question raises issues that have been warmly debated for a long time—issues that are not resolved by reference to the general proposition that the statutory and regulatory measures for the control of narcotic drugs are not intended to interfere with the administration of such drugs in legitimate medical practice. . . .

length from the Prettyman Commission's discussion of this problem, including its references to the very line of cases relied on by the government in this appeal:

> Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly permitted a physician to prescribe narcotic drugs for a patient in the course of "professional practice only" and for "legitimate medical uses" and "legitimate medical purposes." Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a patient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.
>
> During the first 10 years following enactment of the Harrison Act, the Supreme Court affirmed several convictions under the act involving the indiscriminate prescribing of narcotic drugs for addicts. In 1925, however, in *Linder* v. *United States*, 268 U.S. 5, the Court indicated that the dispensing of narcotic drugs by a physician for the purpose of relieving conditions incident to addiction was not in every instance a violation of the act. . . .

> The regulations of the Bureau of Narcotics, however, do not seem to be in accord with [*Linder*] . . .
>
> The practicing physician has thus been confused as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients.[48]

We are aware, as the dissent notes,[49] that this passage appears in the House Report's consideration of a section of the Act which provides for the determination of "appropriate methods of treatment for addicts" in order to "clarify for the medical profession in the United States the extent to which they may safely go in treating narcotic addicts as patients." [50] Yet the publication of acceptable methods, as one response to the impact of the *Linder* holding, does not exclude the implementation of other responses as well, including the exemption of registered practitioners from some penalty provisions. In any event, the general concern of Congress expressed here, taken together with the other aspects of the Act's legislative history which we have reviewed, forcibly undermines the Government's position that precedents under the Harrison Act should be considered "analogously dispositive." [51]

Reversed.

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[48] H. REP. No. 91-1444, *supra* at 14-15.

[49] *See* p. —— infra.

[50] 42 U.S.C. § 257a (1970).

[51] The Government also relies, by way of judicial authority, on three decisions in other circuits in conflict with our holding here. The first of these is United States v. Bartee, 479 F.2d 484 (10th Cir. 1973), wherein § 841 was held to apply to a licensed physician found to be in violation of § 829 and

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the regulations thereunder. The court's reasoning rested on an agreement between the parties that "the provisions exempting medical practitioners are found in 21 U.S.C. § 829 (a) and (b) and 21 C.F.R. § 306.04." *Id.* at 488. The court therefore never considered the effect of § 822, providing for the registration of dispensing physicians, which is the cornerstone of appellant's claim of exemption in this case. The later cases of United States v. Jobe, 487 F.2d 268 (10th Cir. 1973), and United States v. Leigh, 487 F.2d 206 (5th Cir. 1973), rely solely upon *Bartee*. As we respond to a line of reasoning which was not explored in any of these cases, we do not consider them persuasive authority.

MACKINNON, *Circuit Judge*, dissenting: The majority today reverses the conviction of a medical doctor, clearly proven to be a drug pusher (trafficker), on the ground that he was prosecuted under the wrong section of the Controlled Substances Act. They reach this result despite the fact that the section is aimed at drug pushers and "traffickers," which Dr. Moore clearly was. The majority holds that the authorization of a doctor to dispense controlled substances for legitimate medical purposes absolutely immunizes him from prosecution under section 401(a) of the Act, 21 U.S.C. § 841(a) (1970), even when he dispenses narcotic drugs clearly for illegitimate purposes. The majority thus holds that Congress intended to exempt trafficking doctors, merely because they were doctors, from the penalties applicable to other traffickers. The fatal defect in this holding is the failure to recognize that the provision of section 401(a) which excepts authorized conduct does not create a special class of *persons* immune from prosecution for trafficking; rather, it recognizes the legality of the *acts and conduct* of a physician when he dispenses a narcotic drug in good faith for a legitimate medical purpose consistent with the terms of his registration under the Act. The remainder of this opinion points out that the terms of the Act, its prior and subsequent legislative history, and plain common sense demonstrate the fallacy of the majority's approach to this case. I therefore respectfully dissent.

I

Dr. Moore, a physician registered under the Act to dispense methadone for detoxification purposes,[1] was

[1] Tr. at 711-12. Methadone detoxification is a currently accepted medical practice designed to cure a narcotic addict of his addiction. It involves initially a "holding stage" in which the methadone dosage necessary to prevent withdrawal symptoms is determined, after which such dosage is gradually reduced until the patient hopefully reaches a drug-free state. *See* text at 7-8 *infra*.

The Controlled Substances Act was recently amended to include a specific definition of detoxification for purposes of the Act:

> The term 'detoxification treatment' means the dispensing, for a period not in excess of twenty-one days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period.

Narcotic Addict Treatment Act of 1974 § 2, Pub. L. No. 93-281 (May 14, 1974), 88 Stat. 124.

charged in a 639-count indictment[2] filed June 27, 1972, with the knowing and unlawful distribution and dispensation of methadone (dolophine), a Schedule II narcotic drug controlled substance,[3] in violation of section 401(a),

[2] Count one of the indictment is typical of the grand jury charges:

> On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II, narcotic drug controlled substance to, Bobby J. King, as follows: [etc.].

[3] Schedule II.—

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
>
> (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

Act, § 202(b)(2), 21 U.S.C. § 812(b)(2).

21 U.S.C. § 841(a) (1970). Dr. Moore was tried by jury on a retyped indictment containing thirty-eight counts of the original indictment and was convicted on twenty-two of those counts.[4] He was sentenced to concurrent prison terms of five to fifteen years on fourteen counts, and ten to thirty years on the remaining eight counts, to run concurrently with each other but consecutively to the other sentences. He was fined a total of $150,000, a special parole term of twelve years was imposed on each count, to run concurrently as to all counts, and his license to practice medicine in the District of Columbia was revoked pursuant to D.C. Code § 2-131.

The conditions at Dr. Moore's office are indicative of what transpired there and place his dispensing of methadone and his "treatment" of narcotic addicts in perspective. For example, the Doctor employed two armed guards at his office, one of whom carried a .38 caliber pistol which he kept beside him or in his belt, a loaded shotgun, held in both hands with the muzzle pointed upwards (Tr. at 374), and a blackjack (Tr. at 376). The other guard, stationed in the hallway, carried a .45 caliber handgun which he held at the ready in his hand (Tr. at 375). Dr. Moore had a German shepherd dog which sat beside him on the floor in his inner office (Tr. at 376), and on at least one occasion he had a .22 caliber handgun on his desk (Tr. at 129). On another occasion a patient was standing the hallway outside the office and was told by a guard to move. When he did not respond, "fists

[4] At the suggestion of the district court, the original indictment was pared to forty counts; the Government dismissed two counts at the close of its case and the case finally was submitted to the jury on the thirty-eight remaining counts. All other counts of the original 639-count indictment were dismissed by the Government (Tr. at 1002). Dr. Moore was convicted as to all but one of the nine persons named in the indictment as recipients of the illegally dispensed methadone.

[started] flying," and the guard "knocked him down the steps" and out of the office (Tr. at 130-32).

It is unnecessary to recount here the testimony of all the witnesses for the Government which established beyond any doubt the illegal activity of Dr. Moore, since it was substantially cumulative. Rather, the general pattern that emerges from the evidence is detailed and then several representative case histories are discussed.

On a patient's first visit to Dr. Moore's office a nurse would request identification, give the patient several forms to complete, take his weight, height and blood pressure, and request an unsupervised urine specimen. After standing in line for one or two hours with up to 100 other patients, he would finally see Dr. Moore. Moore would ask the patient to display track marks and then ask what he could do for him. The patient would ask for a prescription for dolophine pills. Moore would inform the patient that a prescription for 50 pills was $15, 75 pills for $25, 100 pills for $35 and 150 pills for $50. The patient generally would request and invariably receive a prescription for as many pills as he could afford.

Appointments were never required and return visits followed the same general pattern as initial visits but without any physical examination. The established pattern on return visits was as follows:

> I would go in there, the secretary would take my name; and she would put my folder out and put it in line, you know; on top of the other ones; and when it was my turn, he would call me in the office . . . . (Tr. II 285.)
>
> • • • •
>
> He would ask how many I wanted, and 50, 75 or a hundred, he told me the price; and I told him how much I wanted; and I paid him. (Tr. II 265.)

Each witness was able to procure a prescription for any number of dolophine pills for which he had sufficient cash on hand. Moore generally did not inquire about the daily dosages of his patients and did not give directions as to their proper use.

Bobby James King, a twenty-two year old student at Howard University (Tr. at 57), first went to Dr. Moore with a friend who had visited Moore before. The friend obtained the pills which they then shared, each paying half. He returned to Dr. Moore's on his own (Tr. at 60) because methadone "was cheaper [than heroin] and [he] could get high" (Tr. at 88). He went to Moore not for detoxification but only to procure as much methadone as possible from the Doctor (Tr. at 90-91), since he could get higher on methadone than on heroin (Tr. at 85).

The procedure King went through to join Dr. Moore's program included producing identification to prove he was twenty-one or over and giving an unsupervised urine specimen (Tr. at 61). Blood pressure may have been taken (Tr. at 61, 94-95) and height and weight noted, and finally King saw Dr. Moore, who examined his arms for track marks (Tr. at 63, 95). He then received a half bottle of liquid methadone and a prescription for dolophine pills. On subsequent visits the Doctor typically would ask, "What can I do for you?" and King would respond "100 pills or 50, depending upon the amount of money I had." (Tr. at 65, 113). After filling the prescription, King ingested a sufficient number of dolophines to get high and sold the rest on the street at $1.50 per pill (Tr. at 67). He began by taking two to three dolophines per day and at the end of his "detoxification" treatment his daily dosage was 30-35 dolophines. *Id.* On several occasions King visited Moore twice on one day and received his second prescription for the day without any questions asked (Tr. at 69). He finally quit methadone after Moore's office was closed down: "I just cold turkey kicked it." (Tr. at 78.)

Karen Bryan, a plain clothes policewoman with the Metropolitan Police Department assigned to undercover narcotics duty, visited the Doctor under an assumed name (Tr. at 133-35). She was not, of course, a narcotics user (Tr. at 136) but nonetheless was able to obtain prescriptions for dolophine pills from Moore. After the usual minimal examination she saw Moore for about three minutes, exhibited her "tracks," placed there in a police clinic, and Moore wrote a prescription for 50 dolophines. When leaving, Officer Bryan asked the nurse, "How much for a visit?", the nurse laughed and said, "nothing." (Tr. at 137-38.) On subseqeunt visits her conversations with Dr. Moore were limited to telling him how many pills she desired (Tr. at 139). Although her urinalysis was negative as to all types of narcotics (Tr. at 146), Moore never referred to the test results (Tr. at 141).

Forris Ensor went from 5 to 70 dolophines per day while under Dr. Moore's "detoxification" treatment program (Tr. at 171), but Moore never questioned him about the ever-increasing dosages (Tr. at 194). Roger Wheeler "just gave him the money and got the prescription" (Tr. at 200), always used the dolophines to get high (Tr. at 203) and bought as many as he could afford (Tr. at 200, 202). Ivan Gower was not examined for track marks (Tr. at 240); he asked Moore to detoxify him and Moore replied that he had too many patients and not enough time to attempt detoxification (Tr. at 231). William Burgee "doctored" his unsupervised urine specimen since he was not a narcotics addict (Tr. at 247), but simply purchased prescriptions for a friend (Tr. at 248). Moore never instructed his patients on the proper use of dolophine (Tr. at 254). Herbert Holland would see Moore just long enough to inform Moore of the amount of money he had available and obtain a prescription (Tr. at

286). John Mann initially was on seven dolophines daily, and at the end of detoxification treatment by Dr. Moore he was taking over 100 pills per day (Tr. at 310). James Frazier asked Moore how to detoxify and Moore said "you have to detox, you know, cut down, cut down," but Moore continued to give Frazier prescriptions for any amount of dolophines desired (Tr. at 323).

As established by expert medical testimony at trial, the above evidence conclusively demonstrates that Dr. Moore's detoxification treatment was not "consistent with any method . . . throughout the United States that is accepted by the medical profession in this country." (Tr. at 396, 447-50). Nothing in Dr. Moore's procedures would suggest a "new, effective, good-faith technique in the treatment, detoxificational cure of an addict." (Tr. at 474.) Moore's fee arrangement of increasing prices for a prescription based solely on the number of dolophines prescribed was characterized by one medical expert as follows: "That is not only not acceptable medical practice; that is unethical medical practice." (Tr. at 452, 396-97.)

In contrast to Dr. Moore's procedures, accepted medical practice in the treatment of drug addicts dictates a complete, thorough physical examination (Tr. at 387, 447), not only to correctly diagnose their addiction but also because addicts generally are subject to other diseases that need treatment (Tr. at 447-48). The initial evaluation of a professed addict desiring treatment includes a determination as to (1) the fact of addiction, (2) the nature of the addiction, and (3) the nature of the underlying difficulties that led to addiction (Tr. at 386-87). After determining the daily dosage necessary to prevent withdrawal symptoms, detoxification begins by reducing that dosage by approximately 5-10 milligrams (the equivalent of ½ to 1 dolophines) every three days (Tr. at 441, 443). The methadone is administered daily under direct

staff supervision since addicts, especially in the early stages of detoxification, cannot be trusted (Tr. at 389-90, 445). After four to six weeks an addict who proves trustworthy may be given "weekend privileges," that is, two dosages to be taken without staff supervision (Tr. at 445).

Thus the evidence credited at trial by the jury conclusively establishes that Dr. Moore operated far beyond the pale of accepted medical practice. He clearly did not dispense methadone for detoxification purposes, but rather, quite simply, preyed upon the insatiable cravings of those unfortunate victims he purported to treat solely to get their money. In short, Moore was a drug pusher, a trafficker in illegal narcotics.[*]

II

What sanction then, does the law impose on this drug pusher masquerading in the honorable profession of medicine? The majority opines that the manifest congressional intent is to prosecute drug-pushing doctors under a section reserved for "technical" violations, one that normally contemplates only *civil* penalties but which may result in misdemeanor penalties if the violation is done "knowingly" or more severe penalties if the offender is a repeater. This is facially absurd.

The basic criminal provisions of the Act impose sanctions for three types of illegal conduct. Section 401, 21 U.S.C. § 841, is aimed at drug pushers and traffickers

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[*] In effect Moore sold prescriptions for controlled drugs by the pill and that makes him a trafficker. He also increased the price per pill as the addict or individual requested larger numbers of pills. Thus, while his "price" for 50 pills was $15, or $7.50 for 25 pills, his price was $10 for each additional 25 pills after the first 50. Accordingly, the larger users had to pay a higher price per pill.

in narcotics and thus provides the most severe penalties.[6] Section 402, 21 U.S.C. § 842, is a regulatory provision

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[6] SEC. 401. (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 405, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to naroctic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this

primarily aimed at "technical violations" and accordingly normally contemplates a civil rather than criminal penalty against violators; but where such violations are committed "knowingly," misdemeanor punishment may be imposed if prosecuted by indictment or information.[7]

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paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Act § 401, 21 U.S.C. § 841 (1970).

[7] SEC. 402. (a) It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 309;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 305 of this title;

(4) to remove, alter, or obliterate a symbol or label required by section 305 of this title;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this title or title III;

(6) to refuse any entry into any premises or inspection authorized by this title or title III;

[Continued]

[Continued]

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 304(f) or 511 or to remove or dispose of substances so placed under seal; or

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this title or title III, any information acquired in the course of an inspection authorized by this title concerning any method or process which as a trade secret is entitled to protection.

(b) It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is—

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 306; or

(2) in excess of a quota assigned to him pursuant to section 306.

(c)(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of title 28 of the United States Code to enforce this paragraph.

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of

Repeat offenders may be subjected to greater punishment. Like section 402, section 403, 21 U.S.C. § 843, includes a number of regulatory provisions (some applicable to registrants) but provides more severe sanctions than section 402, and also prohibits the use of communication facilities in the commission of any offense.*

the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

Act § 402, 21 U.S.C. § 842 (1970).

* SEC. 403. (a) It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 308 of this title;

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this title or title III; or

[Continued]

565-411 O - 74 - 5

Section 401(a) provides:

> *Except as authorized* by this title, it shall be unlawful for *any* person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense . . . a controlled substance . . . .

21 U.S.C. § 841(a) (emphasis added). From a "plain language" perspective two things are immediately clear:

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[a] [Continued]

> (5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.
>
> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.
>
> (c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

Act § 403, 21 U.S.C. § 843 (1970).

(1) section 401(a) in terms applies to "*any person*" and (2) the exception does not state "except for registrants," but rather, "except as authorized." There is thus no expressed intent in the language of section 401(a) absolutely to immunize registrants, or any *person*, from prosecution under its terms.

The knowing dispensation of controlled substances by any person is made unlawful unless such act is authorized by some other provision of the Act. Thus, any person may defend against a charged violation of section 401(a) by proof that the Act elsewhere authorized his conduct. In the instant case, Moore would have a defense if he could prove that his conduct as a registrant was within the limits defined by his registration:

> Persons registered . . . to . . . distribute, or dispense controlled substances *are authorized* to . . . distribute, or dispense such substances . . . *to the extent authorized by their registration* and in conformity with the other provisions of this title.

Act, § 302(b), 21 U.S.C. § 822(b) (emphasis added). Dr. Moore admitted at trial that his registration authorized him to dispense methadone only for detoxification purposes in the course of professional practice (Tr. at 711-12). As demonstrated above, it was proven beyond a reasonable doubt that Dr. Moore was not dispensing methadone for detoxification purposes. Rather, he was simply pushing drugs for profit with no intention, and without the effect, of treating his "patients" for *any* medical purpose. Thus, since section 401(a) only provides an exception "to the extent authorized by [the applicable] registration," Dr. Moore clearly was violating section 401(a) by dispensing methadone for other than detoxification purposes.

The majority holds that section 401(a) simply does not apply to registrants. This holding is untenable because section 401(a) prohibits knowing or intentional "dis-

pensing" and by definition of the Act registrants are practically the *only* persons who are capable of dispensing.

> The term "dispense" means to deliver a controlled substance to an ultimate user . . . by . . . a *practitioner*, including the prescribing and administering of a controlled substance . . . . The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

Act, section 102(10), 21 U.S.C. § 802(10) (1970) (emphasis added). And a "practitioner"

> means a physician [and other professional people] . . . *registered* . . . to . . . *dispense* . . . a controlled substance *in the course of professional practice* . . . .

Id. § 102(20), 21 U.S.C. § 802(20) (emphasis added). Accordingly, in the prohibition of unauthorized "dispensing" as defined by the Act, Congress clearly indicated its intention to have section 401(a) apply to all registrants.

The entire thrust of the Act, moreover, demonstrates that registered physicians are "authorized" to dispense controlled substances only in the course of their professional practice, that is, for a legitimate medical purpose. The Act is replete with provisions that manifest a congressional intent to limit a registrant's authorization to conduct conforming to accepted medical practices. Section 102(20), 21 U.S.C. § 802(20) ("registered . . . to . . . dispense . . . in the course of professional practice"); § 202(b)(2)(B), 21 U.S.C. § 812(b)(2)(B) (definition of Schedule II drug: "The drug . . . has a currently accepted medical use in treatment"); § 307(c)(1)(A), 21 U.S.C. § 827(c)(1)(A) (excepting registrants from the requirement of making certain records and reports with respect to narcotics prescribed or administered "by a practitioner in the lawful course of his professional practice"); § 308(e), 21 U.S.C. § 828(e) ("unlawful for any person to obtain . . . controlled substances for any

purpose other than their use . . . in the course of his professional practice"); § 404(a), 21 U.S.C. § 844(a) ("unlawful for any person knowingly or intentionally to possess . . . unless . . . obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice"); § 515(a)(2), 21 U.S.C. § 885(a)(2) ("obtained pursuant to a valid prescription from a practitioner while acting in the course of his professional practice"). These provisions combine to establish an accurate context within which the "except as authorized" proviso of section 401(a) must be construed. And that context indicates an interpretation of the Act that limits a registered physician's authorization to the dispensation of controlled substances in accordance with currently accepted medical practices. When the conduct of a registrant violates this authorized standard he excludes his acts from the exception of section 401(a) and makes himself subject to its penalties. This interpretation results from a plain reading of the statute and is not based on provisions that are reasonably susceptible to "two readings" or dependent on prior decisions interpreting the Harrison Narcotic Act of 1914, 38 Stat. 785.

The majority perceptively notices that Dr. Moore has violated section 309 of the Act, 21 U.S.C. § 829,* and

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* SEC. 309. (a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the require-

that the Act provides that such a violation is punishable under section 402(a)(1), 21 U.S.C. § 842(a)(1). Having demonstrated their keen sense for the obvious, the majority then conclude that since Congress covered a segment of section 401 offenses under section 402, Dr. Moore must be prosecuted under section 402 because it has less severe penalties. Majority Op. at 2. The majority fail to recognize that a registered physician cannot violate section 401(a) without also necessarily violating section 402(a)(1).[10] Their reasoning, then, leads to

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ments of section 307 of this title. No prescription for a controlled substance in schedule II may be refilled.

(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(c) No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(d) Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

Act § 309, 21 U.S.C. § 829.

[10] A registered physician necessarily violates the prescription requirements of section 309 when he violates section 401(a). This is true because a prescription is an order of a physician which states the medicine to be used by a patient to treat his particular illness and is the objective manifestation of applied medical skill and experience. In short, it specifies the prescribed remedy for a particular, diagnosed illness and is thus issued for a valid medical purpose. Unless dispensed directly by a practitioner other than a pharmacist, *see* text at 15 *infra*, a Schedule II controlled substance may be dispensed by a practictioner only with a "written prescription." Act § 309(a), 21 U.S.C. § 829(a) (1970). A practitioner who dispenses a controlled substance in violation of section 401(a) without a diagnosis and not for the treatment of an illness does so for a non-medical purpose. In so doing he does not "prescribe" the drug as a remedy, even though he may have written words on an order form, and thus also violates section 309(a) by dispensing without a "prescription." *See* 21 C.F.R. § 306.04 (1973). Actually, the paper is a fictitious prescription and thus not a valid prescription within the meaning of the Act.

Conversely, a physician may violate section 309 without necessarily being subject to prosecution under section 401(a). That is, a physician who dispenses a controlled substance for a legitimate medical purpose in the course of professional practice but simply fails to comply with the procedural formalities of section 309 could not be prosecuted under section 401(a). For example, if a physician in good faith and for a legitimate medical purpose within the scope of his registration (*e.g.*, detoxification) "knowingly" dispenses methadone by an oral rather than by a written prescription as required under section 309(a), he could only be prosecuted for a misdemeanor under section 402(a)(1), since this procedural infraction is specifically covered by that section. Also, his substantive conduct would be within the scope of his authorization for section 401(a) purposes, but he nevertheless would have acted in a procedurally irregular manner in violation of section 309(a). This is not, however, the situation before the court today.

the patently absurd conclusion that one who commits a lesser included offense cannot be prosecuted for the greater offense because the lesser included offense provides for less severe penalties. In fact that is the basic reasoning of their opinion.

That ambiguity which the majority professes to find so obvious, however, does not exist in fact. Section 401(a) clearly applies to registered physicians when their conduct

is outside the scope of their authorization, while section 402(a)(1) is clearly limited in its application to those "[m]ore or less technical violations" outlined in section 309. H.R. REP. No. 91-1444, 91st Cong., 2d Sess. 10 (1970). Section 309 demonstrably is purely a regulatory provision designed to insure compliance with certain procedural, in contradistinction to substantive, requirements of the Act. Thus the section designates the *form* of prescriptions issued for various scheduled controlled substances; the more dangerous the drug the more formal the prescription required. Schedule I drugs are excluded from section 309 since by definition they have "no currently accepted medical use in treatment" and may not be prescribed. Act § 202(b)(1)(B), 21 U.S.C. § 812(b)(1)(B). Schedule II drugs, which have "a currently accepted medical use" but may result in "severe psychological or physical dependence," *id.*, § 202(b)(2), 21 U.S.C. § 812(b)(2), may be dispensed only by a "*written* prescription," and such prescription may not be refilled. *Id.* § 309(a), 21 U.S.C. § 829(a) (emphasis added). Schedule III and IV drugs, which are relatively less dangerous, *id.* § 202(b)(3),(4), 21 U.S.C. § 812(b)(3),(4), "may be dispensed *without a written or oral* prescription in conformity with" the Federal Food, Drug, and Cosmetic Act, and such prescriptions may be refilled. *Id.* § 309(b), 21 U.S.C. § 829(b) (emphasis added). Schedule V drugs, relatively the least dangerous, *id.* § 202(b)(5), 21 U.S.C. § 812(b)(5), are subject only to the requirement of dispensation for a medical purpose. *Id.* § 309(c), 21 U.S.C. § 829(c).

Consistent with this interpretation, the House referred to violations of section 309 punishable under section 402 as "[m]ore or less technical violations." H.R.REP. No. 91-1444, 91st Cong., 2d Sess. 10 (1970). Section 402, moreover, normally contemplates only a civil proceeding to remedy violations of the procedural requirements of

section 309. If committed "knowingly," however, the violation may be prosecuted as a misdemeanor, Act § 402(c)(2)(A), 21 U.S.C. § 842(c)(2)(A); *id.* § 102(13), 21 U.S.C. § 802(13); 18 U.S.C. § 1 (1970), and repeat offenders may receive up to two years. In contrast to sanctions available under section 402 for procedural irregularities, section 401(a) applies to substantive conduct which exceeds the scope of that authorized by one's registration and provides for felony prosecution.

To further demonstrate the error of the majority's approach, assume the following hypothetical situation. Suppose the existence of all the facts proven in this case with the exception that Dr. Moore personally sold and delivered the dolophine pills to the individuals named in the indictment rather than writing prescriptions to be filled at a pharmacy. Since section 309 permits a physician to dispense drugs directly to the ultimate user without a written prescription, Dr. Moore would not have violated section 309 and thus could not be prosecuted under section 402(a)(1). I assume the majority would nevertheless adhere to the position that Dr. Moore "acted wrongfully." Majority Op. at 7. Assuming all the predicates of the majority opinion as given, then, Moore could not be prosecuted in this situation under either section 401 or 402. Section 402(a)(1) would not be triggered by a violation of section 309, and under the majority's theory the difference between personal and prescriptive delivery of controlled substances would be meaningless because registrants are not subject to section 401(a).

The majority's holding that Dr. Moore can only be prosecuted for a misdemeanor under section 402 rather than for a felony under section 401(a) produces a result not easily susceptible to rational explanation. It is beyond question, I assume, that Congress intended the revoaction of registration of any physician who engaged

in such palpably unlawful drug pushing as that engaged in by Dr. Moore. Revocation, however, is limited to those situations where a registrant:

> (1) has materially falsified any application filed pursuant to or required by this title or title III;
>
> (2) has been convicted of a felony under this title or title III or any other law of the United States, or of any State, relating to any substance defined in this title as a controlled substance; or
>
> (3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances.

Act, § 304(a), 21 U.S.C. § 824(a). There is no evidence that condition (1) has been satisfied. Revocation of Dr. Moore's registration may not be premised on condition (2) since the majority holds that he may only be prosecuted under the misdemeanor provisions of section 402, rather than under the felony provisions of section 401(a). Nor would it appear that revocation can be premised on condition (3), since D.C. Code § 2-131 similarly requires conviction of a felony before a physician's license or registration to practice medicine may be revoked. Thus section 304, premising revocation of registration upon a felony conviction, persuasively suggests that the Congress intended the felony provisions of section 401(a) to be applicable to registrants, such as Dr. Moore, who exceed the scope of conduct authorized by their registration. Otherwise, doctors who trafficked in drugs could never have their registrations revoked.[11]

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[11] The Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281 (May 14, 1974), 88 Stat. 124, enlarged the powers of the Attorney General to revoke registrations. *See* text at 26-27 *infra*.

Moreover, the majority's decision that no registered physician can be prosecuted under section 401 of the Act is in direct conflict with recent decisions in the Fifth and Tenth Circuits. In *United States v. Bartee*, 479 F.2d 484, 488 (10th Cir. 1973) (emphasis in original), the court specifically held that

> when a medical practitioner issues a prescription which is *not* for a legitimate medical purpose and is *not* in the usual course of his professional practice,

he is subject to prosecution under section 401. The court also considered that the cases under the now repealed Harrison Narcotics Act were analogous, as the Government has argued in this case. The Tenth Circuit reaffirmed *Bartee* in *United States v. Jobe*, 487 F.2d 268 (10th Cir. 1973). The Fifth Circuit has aligned itself with the Tenth, indicating that a registered physician may be prosecuted under section 401

> for the unlawful dispensing of a controlled substance, if his prescription is not for a legitimate medical purpose in the usual course of his professional practice . . . .

United States v. Leigh, 487 F.2d 206, 207 (5th Cir. 1973). Thus both circuits have held that a registered physician may be prosecuted under section 401 when he issues prescriptions for controlled substances in an unauthorized manner. I agree.

III

The legislative history of the Controlled Substances Act is fairly straightforward and supports the foregoing interpretation. The Act fundamentally revised the penalty structure of the Harrison Narcotic Act of 1914, 38 Stat. 785, by implementing more rational and sophisticated sanctions based upon the nature of particular violations. Under the Harrison Act a violation of *any* of the Act's provisions uniformly was punishable by a

fine of not more than $2,000 or imprisonment for not more than five years, or both. By contrast, the present Act, passed in 1970, was

> designed to deal in a comprehensive fashion with the growing menace of drug abuse . . . by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.
>
> * * * *
>
> The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations.

H.R. REP. No. 91-1444, 91st Cong., 2d Sess. 1, 4 (1970). In short, the comprehensive revision was designed to make the penalty fit the crime.

The House Report indicates that registered physicians were intended to be subject to felony prosecution under section 401(a). On this point, the majority misrepresents the basic thrust of the House Report insofar as it relates to the Prettyman Commission Report by only quoting the Commission's discussion without noting or analyzing the conclusions drawn from that discussion by the House and by ignoring the specific legislative solution enacted by Congress. The Prettyman Commission focused on the difficulties faced by physicians in determining the conditions under which they lawfully could dispense narcotics in the treatment of addicts. As a result of such difficulties, "[i]n most instances they shun addicts as patients." The House reacted to this problem not by absolutely immunizing registered physicians from felony prosecution for trafficking in narcotics, as the majority holds, but by joining with the Senate in enacting section 4 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 42 U.S.C. § 257a (1970) (emphasis added):

> The Secretary of Health, Education, and Welfare, after consultation with the Attorney General and with national organizations representative of persons with knowledge and experience in the treatment of narcotic addicts, *shall determine the appropriate methods of professional practice in the medical treatment of the narcotic addiction* of various classes of narcotic addicts, and shall report thereon from time to time to the Congress.

With respect to this legislation the House Report stated:

> Section 4 of the reported bill provides that the Secretary of Health, Education, and Welfare, after consultation with national organizations, shall determine appropriate methods of professional practice in the medical treatment of the narcotic addiction of various classes of narcotic addicts, and report thereon from time to time to the Congress. The purpose of this provision is to clarify for the medical profession in the United States the extent to which they may safely go in treating narcotic addicts as patients.

H.R. REP. No. 91-1444, 91st Cong., 2d Sess. 14 (1970). Immediately following this paragraph the House Report quotes that portion of the Prettyman Commission Report cited by the majority and discussed above, and then continues:

> The committee expects that the determinations made by the Secretary of Health, Education, and Welfare will clarify for the medical profession *the conditions under which narcotic drugs may be prescribed for the medical treatment of narcotic addicts.* Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of the practice of medicine, it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecution of physicians whose methods of prescribing narcotic drugs have not conformed to the

> opinions of Federal prosecutors of what constitutes appropriate methods of professional practice. In view of this situation, this section will provide guidelines, determined by the principal health agency of the Federal Government, after consultation with appropriate national professional organizations. Those *physicians who comply* with the recommendations made by the Secretary will no longer jeopardize their professional careers by accepting narcotic addicts as patients.

Id. at 15 (emphasis added). See also H.R. REP. No. 91-1603, 91st Cong., 2d Sess. 5 (Conference Report) (1970). Thus the Congress provided a completely different legislative and administrative solution to the problem that the majority indicates. And it is one in which the manifest intent of the Act is that physicians who comply with the terms of their registration and other applicable regulations are "authorized" under section 401(a). When they act outside the clearly defined bounds of their registration, they act in an unauthorized manner and are subject to prosecution under section 401(a).

Sharply distinguished in the legislative history from the unauthorized drug pushing engaged in by Dr. Moore and punishable under section 401(a), are violations of the regulatory provisions of section 402. A registered physician may be punished under section 402(a)(1) if he violates section 309. Section 309 simply regulates the type and nature of prescriptions required to be issued when dispensing controlled substances. As discussed previously,[12] section 309 imposes purely formal requirements —written, oral or no prescription—which vary according to the dangerousness of the drug dispensed. Thus, as the House Report states, these "[m]ore or less technical violations . . . are punishable by less severe penalties." *Id.* at 10. Indeed, section 402 provides that a violation

[12] *See* text at 18-19 *supra.*

of its provisions does not constitute a crime, except when committed knowingly, and then a maximum punishment of one year, or two years for repeat offenders, may be imposed. To impose such minor punishment on drug pushers would be completely inconsistent with the maximum punishments authorized by the Act for other violations. For example, under section 403(a), 21 U.S.C. § 843(a), registrants who distribute controlled substances without using the proper order form can be sentenced to imprisonment for up to four years for an initial violation and up to eight years for a second offense.[13] *Nonetheless, the majority here holds that drug pushing registrants can only be prosecuted under section 402, the principal thrust of which is to impose civil penalties, and misdemeanor punishment not to exceed one year imprisonment for the initial offense or two years for subsequent offenses.* Certainly Congress never intended such gross inequality of penalties which would punish lesser offenses more severely than greater offenses.

Further evidence that the Congress intended section 401(a) to apply to registered physicians is contained in the Narcotic Addict Treatment Act of 1974 (NATA), Pub. L. No. 93-281 (May 14, 1974), 88 Stat. 124, and its legislative history. NATA amended the Controlled Substances Act to provide greater controls against the illegal diversion of narcotics by unscrupulous physicians, recognizing that

> most methadone diverted for illegal use and sale is derived from one of four major sources: (1) unscrupulous activities of certain individual practitioners . . . .

H.R. REP. No. 93-884, 93d Cong., 2d Sess. 3 (1974); S. REP. No. 93-192, 93d Cong., 1st Sess. 6 (1973). NATA implemented this objective by requiring a separate,

[13] *See* note 8 *supra.*

special registration for practitioners engaged in detoxification and maintenance programs and by providing for summary revocation of such registration for failure to comply with specific standards. This special registration was designed to enable the Attorney General immediately to halt illegitimate and dangerous narcotic detoxification and maintenance programs where successful felony prosecution of registered physicians under section 401(a) would be either too difficult or too slow and time-consuming. *Id.* at 3, 11-15.

Moreover, the Congress continues specifically to contemplate prosecution under section 401(a) of registered physicians who engage in such illegal activities as Dr. Moore. Indeed, the Senate Report on NATA used the case of Dr. Moore as the most egregious example of an unscrupulous physician operating in illicit drug traffic prosecutable under the drug-pushing section of the Controlled Substances Act:

> In some communities, one or more physicians have contributed substantially to the illicit traffic in methadone. Some of these instances involved careless or unscrupulous physicians who were prescribing methadone as a pain killer, while others involved physicians who were operating as pushers under the guise of a detoxification program, for which no special registration was required. One of the most notorious cases is that of Dr. Thomas Moore who operated a "methadone program" in the District of Columbia until his final conviction of illegal distribution of methadone on an indictment alleging 38 separate counts. Moore operated from his office with impunity for over two years during which time drugs obtained by addicts from him were often found in the illicit traffic and believed to be involved in cases of narcotic overdose deaths.
>
> • • • •

> Dr. Moore was eventually found guilty on 22 counts and sentenced to a term of 15 to 45 years and fined $150,000. However, if the Attorney General had had the authority provided in S. 1115, as amended, the BNDD could have moved against this dangerous profiteer far more expeditiously.

Id. at 7.

The only concern manifested by the Congress with felony prosecution of doctors under section 401(a) was that it may be too difficult to establish that a physician acted outside "the course of professional practice," thereby exceeding the authorization exception of section 401(a). Congress indicated its concern with

> the present difficulty in such prosecutions because of the intricate and nearly impossible burden of establishing what is beyond "the course of professional practice" for criminal law purposes when such a practitioner speciously claims that the practices in question were ethical and humanitarian in nature.
>
> • • • •
>
> As illustrated by the example of Dr. Moore, . . . the Attorney General was unable to take successful criminal action against profiteering practitioners except in the most aggravated of circumstances and then only after prolonged effort to make undercover penetrations.

Id. at 14, 13.[14] Thus the Congress is completely aware of the prosecution of trafficking physicians as such and it clearly was, and is, Congress' intent that registered physicians be prosecuted under the felony provisions of

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[14] When the Dr. Moore investigation was finished, there was abundant proof that he acted outside the course of professional practice. Dr. Moore also admitted that his registration was limited to detoxification (Tr. 711-12). Thus the acts for which he was convicted were outside his authorization.

565-411 O - 74 - 5

section 401(a) when they knowingly or intentionally dispense controlled substances other than in "the course of professional practice" and in excess of their registration.

In holding that drug trafficking registrants are absolutely immune from prosecution under the regular drug trafficking section applicable to "any person," the majority has totally misread the Act and misconstrued the legislative history. I would accordingly hold to the contrary and, having considered all the other points raised by appellant and found them to be without merit, would affirm the convictions on all counts except those in which double sentences were imposed for dispensing to minors without any such allegations being set forth in the indictment. It is my view that the count upon which a sentence is imposed must allege that the victim is a minor if the additional punishment for sale to a minor is sought to be adjudged. As to these counts, I would remand the case for resentencing.[15]

[15] This refers to the sentences imposed on counts 16, 17, 18, 20, 21, 23, 24 and 25 of 10 to 30 years and $10,000 on each such count, that is, $80,000 total. I would not in any way require the district court to interfere with the consecutive nature of these sentences to the sentences on the other counts, but the court of course would also correct the total sentence in keeping with the ultimate sentences imposed.

APPENDIX B

United States Court Of Appeals for the District of Columbia Circuit

September Term, 1974
Criminal 1350–72

No. 73–1192

UNITED STATES OF AMERICA
v.
THOMAS W. MOORE, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

Before BAZELON, Chief Judge, McGOWAN and MACKINNON, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court

Hugh E. Kline

HUGH E. KLINE,

Clerk.

Date: October 18, 1974

Opinion for the Court filed by Chief Judge Bazelon.

Dissenting opinion filed by Circuit Judge MacKinnon.

APPENDIX C

21 U.S.C. 802 DEFINITIONS

* * * * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

* * * * *

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

§ 829 PRESCRIPTIONS

(*a*) *Schedule II substances*

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the

Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 353(b) of this title. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

(*b*) *Schedule III and IV substances*

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 353(b) of this title. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(*c*) *Schedule V substances*

No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(*d*) *Non-prescription drugs with abuse potential*

Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

§ 841 Prohibited Acts A

(*a*) *Unlawful acts*

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or

possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(*b*) *Penalties.*

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after

one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(*c*) *Special parole term*

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

§ 842 Prohibited Acts B

(*a*) *Unlawful acts*

It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 825 of this title;

(4) to remove, alter, or obliterate a symbol or label required by section 825 of this title;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of this chapter;

(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824(f) or 881 of this title or to remove or dispose of substances so placed under seal; or

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection.

(*b*) *Manufacture*

It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is—

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or

(2) in excess of a quota assigned to him pursuant to section 826 of this title.

(*c*) *Penalties*

(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of Title 28 to enforce this paragraph.

(2) (A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant sub-

stances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

§ 843 Prohibited Acts C

(a) *Unlawful acts*

It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print,

imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) *Communication facility*

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) *Penalties*

Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

21 C.F.R. 306.04 Purpose of Issue of Prescription

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

(c) A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs, in the course of conducting an authorized clinical investigation in the development of a narcotic addict rehabilitation program.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-759

UNITED STATES OF AMERICA,
Petitioner

—v.—

THOMAS W. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 17, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-759

UNITED STATES OF AMERICA,

Petitioner

—v.—

THOMAS W. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX*

	Page
Relevant docket entries	1-2
Indictment, filed June 27, 1972	3-29
38-count retyped indictment submitted to the jury	30-34
Excerpts from the transcript of proceedings before the Honorable Gerhard A. Gesell on September 12, 1972	35-38
Excerpts from the trial transcript	38-125

* A copy of the opinion of the United States Court of Appeals for the District of Columbia Circuit was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-48a). The judgment of the court of appeals was reproduced as Appendix B to the petition (pp. 49a-50a).

Page

Excerpts from the trial transcript—Continued

Testimony of Bobby King 38-45
Testimony of K...en Bryan 46-52
Testimony of Forris Ensor 53-57
Testimony of Roger W. Wheeler 58
Testimony of Ivan Gower 59-64
Testimony of William N. Burgee 65-67
Testimony of Jerome Brooks 68-71
Testimony of Herbert B. Holland 72-73
Testimony of Kenneth A. Brown 74-77
Testimony of Dr. David H. Fram 78-83
Testimony of Dr. Thomas E. Piemme 84-90
Testimony of Agent William J. Miller 91-96
Testimony of Thomas W. Moore, Jr. 97-116
Court's instructions to the jury 117-125

Transcript of sentencing proceedings before the Honorable Gerhard A. Gesell on November 13, 1972 126-134

Government Exhibit 31 135-138

Judgment and Commitment 139-141

Order Allowing Certiorari 142

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1350-72

UNITED STATES

—v.—

THOMAS W. MOORE, JR.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1972	
	* * * *
July 13	Deft. handed copy of Indictment. ARRAIGNED: Plea Not Guilty.
	* * * *
Sept 5	Motion to suppress & for return of property. C/S P/A FIAT—GESELL,
Sept 12	Status Conference: Trial is set for 10-16-72 at 9:30 A.M.; Bond. GESELL, J. Rep-Harper; Edwin Brown; Atty.
Sept 14	Govt's opposition to Motion to suppress. C/S
Sept 21	Transcript of proceedings of Sept. 12, 1972; pages 1-12; Court's Rep-P. Harper
Sept 25	ORDER denying motion of deft. to suppress and for return of prop GESELL, J. (N)
Sept 26	Govt's notice of intention to sever counts c/s
	* * * *
Oct 16	Retyped indictment filed.; Motion of Govt to sever counts, Granted; Case called for trial.
	* * * *

DATE	PROCEEDINGS
1972	
Oct 21	Trial resumed * * *, VERDICT: GUILTY on Counts 3, 5, 7, 8, 9, 13, 14, 16, 17, 18, 20, 21, 23, 24, 25, 27, 29, 30, 31, 32, 35 & 37 of the retyped indictment
	* * * *
Nov 20	Notice of appeal from sentence of Nov. 13, 1972.
	* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 3, 1972

THE UNITED STATES OF AMERICA

v.

THOMAS W. MOORE, JR.

Criminal No.

U. S. Mag. No. 22-531-72

Violation: 21 U.S.C. 841(a)

(Unlawful Distribution and Dispensation of Controlled Substance)

The Grand Jury charges:

COUNTS 1 THROUGH 35

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II, narcotic drug controlled substance to, Bobby J. King, as follows:

COUNT	DATE	AMOUNT OF TABLETS
1	September 27, 1971	50
2	October 4, 1971	50
3	October 12, 1971	50
4	October 16, 1971	50
5	October 26, 1971	50
6	October 29, 1971	50
7	October 31, 1971	100
8	November 6, 1971	50
9	November 8, 1971	50
10	November 12, 1971	50

COUNT	DATE	AMOUNT OF TABLETS
11	November 17, 1971	50
12	November 22, 1971	50
13	November 24, 1971	50
14	November 29, 1971	50
15	December 1, 1971	50
16	December 3, 1971	50
17	December 6, 1971	100
18	December 9, 1971	50
19	December 11, 1971	100
20	December 14, 1971	100
21	December 16, 1971	100
22	December 17, 1971	100
23	January 5, 1972	50
24	January 5, 1972	50
25	January 10, 1972	50
26	January 10, 1972	50
27	January 17, 1972	100
28	January 19, 1972	100
29	January 21, 1972	100
30	January 25, 1972	50
31	January 26, 1972	100
32	January 28, 1972	50
33	February 1, 1972	50
34	February 4, 1972	100
35	February 8, 1972	100

COUNTS 36 THROUGH 77

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule

II, narcotic drug controlled substance to, James Silk, as follows:

COUNT	DATE	AMOUNT OF TABLETS
36	August 27, 1971	50
37	August 30, 1971	75
38	September 2, 1971	100
39	September 3, 1971	50
40	September 24, 1971	50
41	September 27, 1971	100
42	September 28, 1971	75
43	October 4, 1971	50
44	October 6, 1971	50
45	October 8, 1971	50
46	October 12, 1971	100
47	October 16, 1971	100
48	October 19, 1971	60
49	October 21, 1971	100
50	October 25, 1971	100
51	October 28, 1971	100
52	October 30, 1971	100
53	November 1, 1971	100
54	November 6, 1971	100
55	November 8, 1971	100
56	November 15, 1971	100
57	November 17, 1971	100
58	November 19, 1971	75
59	November 24, 1971	50
60	November 29, 1971	100
61	December 3, 1971	100
62	December 10, 1971	100
63	December 11, 1971	50
64	December 13, 1971	100
65	December 17, 1971	100
66	December 20, 1971	100
67	December 21, 1971	150

COUNT	DATE	AMOUNT OF TABLETS
68	December 23, 1971	150
69	January 7, 1972	150
70	January 10, 1972	100
71	January 12, 1972	100
72	January 14, 1972	100
73	January 25, 1972	100
74	January 26, 1972	100
75	January 28, 1972	100
76	February 4, 1972	100
77	February 8, 1972	150

COUNTS 78 THROUGH 86

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to Carol Timmons, as follows:

COUNT	DATE	AMOUNT OF TABLETS
78	August 30, 1971	50
79	September 2, 1971	50
80	September 3, 1971	50
81	September 24, 1971	50
82	September 27, 1971	50
83	September 28, 1971	50
84	October 6, 1971	50
85	October 8, 1971	50
86	October 12, 1971	50

COUNTS 87 THROUGH 111

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Dennis Kelly, as follows:

COUNT	DATE	AMOUNT OF TABLETS
87	November 1, 1971	50
88	November 8, 1971	50
89	November 16, 1971	50
90	November 19, 1971	75
91	November 22, 1971	100
92	November 24, 1971	100
93	November 29, 1971	100
94	December 1, 1971	100
95	December 3, 1971	100
96	December 8, 1971	75
97	December 10, 1971	100
98	December 16, 1971	50
99	December 17, 1971	100
100	December 20, 1971	100
101	January 5, 1972	100
102	January 7, 1972	100
103	January 11, 1972	100
104	January 13, 1972	100
105	January 17, 1972	100
106	January 19, 1972	100
107	January 21, 1972	100
108	January 25, 1972	100
109	January 28, 1972	100
110	January 31, 1972	100
111	February 4, 1972	100

COUNTS 112 THROUGH 115

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlaw-

fully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Karen Bryan, also known as Lynn A. Ryan, as follows:

COUNT	DATE	AMOUNT OF TABLETS
112	February 2. 1972	50
113	February 4, 1972	50
114	February 8, 1972	100
115	February 9, 1972	150

COUNTS 116 THROUGH 146

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Ivan Gower, as follows:

COUNT	DATE	AMOUNT OF TABLETS
116	September 3, 1971	100
117	September 20, 1971	100
118	September 24, 1971	100
119	September 27, 1971	50
120	October 4, 1971	50
121	October 6, 1971	75
122	October 8, 1971	50
123	October 11, 1971	50
124	October 18, 1971	100
125	October 20, 1971	50
126	October 26, 1971	75
127	October 28, 1971	50
128	November 1, 1971	50
129	November 4, 1971	50
130	November 6, 1971	100
131	November 9, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
132	November 12, 1971	50
133	November 15, 1971	100
134	November 17, 1971	75
135	December 20, 1971	75
136	December 22, 1971	100
137	January 10, 1972	100
138	January 13, 1972	50
139	January 14, 1972	50
140	January 18, 1972	100
141	January 24, 1972	50
142	January 26, 1972	100
143	January 28, 1972	50
144	January 31, 1972	100
145	February 4, 1972	100
146	February 7, 1972	100

COUNTS 147 THROUGH 172

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Forris Ensor, as follows:

COUNT	DATE	AMOUNT OF TABLETS
147	August 27, 1971	100
148	September 2, 1971	100
149	September 7, 1971	100
150	September 24, 1971	100
151	September 29, 1971	100
152	October 4, 1971	100
153	October 8, 1971	100
154	October 15, 1971	100
155	October 26, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
156	October 28, 1971	100
157	November 3, 1971	100
158	November 10, 1971	100
159	November 12, 1971	100
160	November 17, 1971	100
161	November 19, 1971	100
162	November 24, 1971	100
163	November 29, 1971	100
164	December 3, 1971	100
165	December 6, 1971	100
166	December 10, 1971	100
167	December 13, 1971	100
168	December 17, 1971	100
169	December 20, 1971	100
170	December 22, 1971	75
171	December 27, 1971	100
172	January 4, 1972	100

COUNTS 173 THROUGH 195

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligrams dolophine tablets, a Schedule II narcotic drug controlled substance to, Raymond Bowings, as follows:

COUNT	DATE	AMOUNT OF TABLETS
173	September 29, 1971	50
174	October 1, 1971	100
175	October 6, 1971	100
176	October 11, 1971	100
177	October 18, 1971	100
178	October 27, 1971	100
179	October 30, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
180	November 5, 1971	100
181	November 12, 1971	100
182	November 16, 1971	100
183	November 23, 1971	100
184	November 29, 1971	100
185	December 7, 1971	100
186	December 11, 1971	100
187	December 18, 1971	100
188	January 5, 1972	100
189	January 10, 1972	100
190	January 18, 1972	100
191	January 21, 1972	100
192	January 24, 1972	100
193	January 31, 1972	100
194	February 3, 1972	100
195	February 9, 1972	100

COUNTS 196 THROUGH 244

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Chris Scheper, as follows:

COUNT	DATE	AMOUNT OF TABLETS
196	September 3, 1971	50
197	September 27, 1971	50
198	September 29, 1971	75
199	October 20, 1971	60
200	October 4, 1971	50
201	October 6, 1971	50
202	October 8, 1971	50
203	October 12, 1971	50

COUNT	DATE	AMOUNT OF TABLETS
204	October 14, 1971	75
205	October 18, 1971	50
206	October 22, 1971	50
207	October 25, 1971	50
208	October 27, 1971	100
209	October 29, 1971	50
210	November 1, 1971	50
211	November 3, 1971	50
212	November 5, 1971	75
213	November 8, 1971	50
214	November 10, 1971	50
215	November 12, 1971	50
216	November 15, 1971	50
217	November 17, 1971	50
218	November 19, 1971	50
219	November 22, 1971	50
220	November 24, 1971	50
221	November 29, 1971	50
222	December 1, 1971	50
223	December 3, 1971	50
224	December 6, 1971	50
225	December 8, 1971	50
226	December 10, 1971	50
227	December 13, 1971	50
228	December 15, 1971	50
229	December 17, 1971	50
230	December 20, 1971	50
231	December 22, 1971	50
232	December 23, 1971	50
233	January 6, 1972	50
234	January 10, 1972	50
235	January 12, 1972	50
236	January 14, 1972	100
237	January 17, 1972	50

COUNT	DATE	AMOUNT OF TABLETS
238	January 19, 1972	50
239	January 21, 1972	50
240	January 25, 1972	50
241	January 27, 1972	50
242	January 31, 1972	100
243	February 2, 1972	50
244	February 7, 1972	50

COUNTS 245 THROUGH 278

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Herbert Bruce Holland, as follows:

COUNT	DATE	AMOUNT OF TABLETS
245	August 30, 1971	100
246	September 3, 1971	100
247	September 20, 1971	75
248	September 28, 1971	50
249	October 12, 1971	50
250	October 18, 1971	50
251	October 23, 1971	75
252	October 29, 1971	50
253	November 3, 1971	75
254	November 6, 1971	100
255	November 10, 1971	50
256	November 16, 1971	75
257	November 20, 1971	100
258	November 29, 1971	100
259	December 3, 1971	100
260	December 9, 1971	100
261	December 11, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
262	December 14, 1971	75
263	December 17, 1971	50
264	December 20, 1971	100
265	December 21, 1971	50
266	December 23, 1971	50
267	December 24, 1971	150
268	January 5, 1972	75
269	January 6, 1972	50
270	January 10, 1972	100
271	January 14, 1972	100
272	January 18, 1972	100
273	January 21, 1972	100
274	January 28, 1972	50
275	January 31, 1972	50
276	February 2, 1972	100
277	February 8, 1972	100
278	February 9, 1972	100

COUNTS 279 THROUGH 283

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled sustance to, Stephen Franklin, as follows:

COUNT	DATE	AMOUNT OF TABLETS
279	January 12, 1972	50
280	January 21, 1972	100
281	January 28, 1972	100
282	February 2, 1972	150
283	February 9, 1972	200

COUNTS 284 THROUGH 331

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to Roger Wheeler, as follows:

COUNT	DATE	AMOUNT OF TABLETS
284	August 26, 1971	50
285	August 30, 1971	50
286	September 3, 1971	100
287	September 28, 1971	50
288	October 1, 1971	50
289	October 4, 1971	50
290	October 7, 1971	50
291	October 8, 1971	50
292	October 11, 1971	50
293	October 14, 1971	50
294	October 18, 1971	50
295	October 20, 1971	50
296	October 23, 1971	50
297	October 26, 1971	50
298	October 29, 1971	50
299	November 1, 1971	50
300	November 3, 1971	50
301	November 8, 1971	50
302	November 10, 1971	50
303	November 15, 1971	50
304	November 17, 1971	50
305	November 19, 1971	50
306	November 22, 1971	50
307	November 24, 1971	50
308	November 29, 1971	50
309	December 1, 1971	50

COUNT	DATE	AMOUNT OF TABLETS
310	December 3, 1971	50
311	December 6, 1971	50
312	December 8, 1971	50
313	December 10, 1971	50
314	December 13, 1971	50
315	December 15, 1971	50
316	December 17, 1971	50
317	December 20, 1971	50
318	December 22, 1971	50
319	December 23, 1971	50
320	December 24, 1971	50
321	December 28, 1971	50
322	January 10, 1972	100
323	January 12, 1972	50
324	January 14, 1972	50
325	January 19, 1972	50
326	January 21, 1972	50
327	January 24, 1972	50
328	January 26, 1972	50
329	January 27, 1972	50
330	February 1, 1972	50
331	February 4, 1972	50

COUNTS 332 THROUGH 358

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Robert Cerniglia, as follows:

COUNT	DATE	AMOUNT OF TABLETS
332	November 2, 1971	100
333	November 16, 1971	50

COUNT	DATE	AMOUNT OF TABLETS
334	November 20, 1971	75
335	November 23, 1971	75
336	November 30, 1971	50
337	December 4, 1971	75
338	December 8, 1971	50
339	December 9, 1971	50
340	December 11, 1971	50
341	December 14, 1971	50
342	December 18, 1971	75
343	December 22, 1971	75
344	December 24, 1971	50
345	January 5, 1972	75
346	January 7, 1972	50
347	January 10, 1972	75
348	January 13, 1972	75
349	January 17, 1972	100
350	January 20, 1972	100
351	January 21, 1972	50
352	January 24, 1972	75
353	January 27, 1972	50
354	January 28, 1972	75
355	January 31, 1972	100
356	February 2, 1972	100
357	February 4, 1972	100
358	February 8, 1972	150

COUNTS 359 THROUGH 360

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule

II narcotic drug controlled substance to, Richard L. Jacob, also known as Lloyd Johnson, as follows:

COUNT	DATE	AMOUNT OF TABLETS
359	January 26, 1972	50
360	January 31, 1972	100

COUNTS 361 THROUGH 393

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Robert Fennell, as follows:

COUNT	DATE	AMOUNT OF TABLETS
361	October 1, 1971	50
362	October 6, 1971	50
363	October 14, 1971	50
364	October 16, 1971	100
365	October 20, 1971	100
366	October 27, 1971	50
367	October 29, 1971	50
368	November 5, 1971	100
369	November 8, 1971	50
370	November 12, 1971	100
371	November 16, 1971	100
372	November 20, 1971	100
373	November 24, 1971	100
374	November 29, 1971	100
375	December 3, 1971	100
376	December 9, 1971	100
377	December 11, 1971	100
378	December 14, 1971	50
379	December 15, 1971	100
380	December 17, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
381	December 20, 1971	100
382	December 23, 1971	100
383	December 24, 1971	100
384	January 5, 1972	100
385	January 6, 1972	100
386	January 10, 1972	100
387	January 18, 1972	100
388	January 20, 1972	100
389	January 24, 1972	100
390	January 27, 1972	100
391	January 31, 1972	100
392	February 3, 1972	100
393	February 9, 1972	100

COUNTS 394 THROUGH 420

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, John J. Evans, as follows:

COUNT	DATE	AMOUNT OF TABLETS
394	October 22, 1971	50
395	October 27, 1971	50
396	November 16, 1971	50
397	November 23, 1971	100
398	November 29, 1971	50
399	December 1, 1971	75
400	December 3, 1971	75
401	December 6, 1971	75
402	December 10, 1971	100
403	December 13, 1971	75
404	December 15, 1971	75

COUNT	DATE	AMOUNT OF TABLETS
405	December 17, 1971	50
406	December 22, 1971	50
407	January 7, 1972	50
408	January 10, 1972	75
409	January 12, 1972	100
410	January 14, 1972	100
411	January 17, 1972	50
412	January 19, 1972	50
413	January 21, 1972	50
414	January 24, 1972	75
415	January 26, 1972	50
416	January 28, 1972	100
417	January 31, 1972	75
418	February 2, 1972	100
419	February 4, 1972	100
420	February 9, 1972	75

COUNTS 421 THROUGH 426

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, William N. Burgee, as follows:

COUNT	DATE	AMOUNT OF TABLETS
421	January 25, 1972	50
422	January 28, 1972	100
423	February 1, 1972	150
424	February 2, 1972	100
425	February 7, 1972	150
426	February 9, 1972	150

COUNTS 427 THROUGH 452

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Elmer Daniel, as follows:

COUNT	DATE	AMOUNT OF TABLETS
427	October 11, 1971	100
428	October 15, 1971	50
429	October 18, 1971	75
430	October 20, 1971	75
431	October 22, 1971	75
432	October 27, 1971	75
433	November 3, 1971	75
434	November 10, 1971	100
435	November 15, 1971	50
436	November 18, 1971	50
437	November 20, 1971	75
438	November 23, 1971	75
439	November 29, 1971	75
440	December 2, 1971	100
441	December 4, 1971	100
442	December 10, 1971	100
443	December 14, 1971	100
444	December 17, 1971	100
445	December 21, 1971	75
446	December 23, 1971	100
447	December 24, 1971	100
448	January 7, 1972	75
449	January 10, 1972	50
450	January 25, 1972	75
451	January 27, 1972	75
452	February 7, 1972	100

COUNTS 453 THROUGH 455

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, William Miller, as follows:

COUNT	DATE	AMOUNT OF TABLETS
453	January 13, 1972	50
454	January 18, 1972	100
455	January 24, 1972	100

COUNTS 456 THROUGH 503

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, John Amtmann, as follows:

COUNT	DATE	AMOUNT OF TABLETS
456	September 1, 1971	50
457	September 10, 1971	50
458	September 20, 1971	75
459	October 8, 1971	75
460	October 11, 1971	100
461	October 14, 1971	110
462	October 18, 1971	100
463	October 21, 1971	75
464	October 25, 1971	50
465	October 28, 1971	50
466	October 29, 1971	100
467	November 2, 1971	100
468	November 4, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
469	November 8, 1971	50
470	November 13, 1971	100
471	November 15, 1971	75
472	November 17, 1971	50
473	November 19, 1971	100
474	November 22, 1971	100
475	November 24, 1971	75
476	November 29, 1971	75
477	December 1, 1971	75
478	December 3, 1971	75
479	December 6, 1971	75
480	December 8, 1971	100
481	December 10, 1971	50
482	December 13, 1971	100
483	December 15, 1971	50
484	December 17, 1971	100
485	December 20, 1971	100
486	December 21, 1971	100
487	December 24, 1971	100
488	December 28, 1971	100
489	January 5, 1972	100
490	January 7, 1972	100
491	January 10, 1972	100
492	January 12, 1972	100
493	January 14, 1972	100
494	January 17, 1972	100
495	January 19, 1972	100
496	January 21, 1972	100
497	January 24, 1972	100
498	January 26, 1972	100
499	January 28, 1972	150
500	January 31, 1972	150
501	February 2, 1972	150
502	February 4, 1972	100
503	February 9, 1972	150

COUNTS 504 THROUGH 519

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Jerome Brooks, as follows:

COUNT	DATE	AMOUNT OF TABLETS
504	September 30, 1971	50
505	October 16, 1971	50
506	November 2, 1971	50
507	November 4, 1971	50
508	November 8, 1971	75
509	November 12, 1971	75
510	November 16, 1971	75
511	November 23, 1971	50
512	December 8, 1971	100
513	December 14, 1971	50
514	December 22, 1971	100
515	December 23, 1971	50
516	January 14, 1972	100
517	January 20, 1972	100
518	January 27, 1972	50
519	February 9, 1972	50

COUNTS 520 THROUGH 548

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule

II narcotic drug controlled substance to, John Gately, as follows:

COUNT	DATE	AMOUNT OF TABLETS
520	August 27, 1971	50
521	September 3, 1971	100
522	September 28, 1971	75
523	October 4, 1971	50
524	October 7, 1971	100
525	October 11, 1971	50
526	October 15, 1971	50
527	October 22, 1971	100
528	October 26, 1971	75
529	October 30, 1971	75
530	November 2, 1971	100
531	November 6, 1971	50
532	November 10, 1971	75
533	November 15, 1971	75
534	November 20, 1971	50
535	November 24, 1971	75
536	November 30, 1971	50
537	December 4, 1971	75
538	December 8, 1971	75
539	December 13, 1971	100
540	December 18, 1971	75
541	December 22, 1971	75
542	December 24, 1971	100
543	January 5, 1972	75
544	January 12, 1972	75
545	January 18, 1972	75
546	January 26, 1972	75
547	February 1, 1972	75
548	February 8, 1972	75

COUNTS 549 THROUGH 576

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Robert Povleski, as follows:

COUNT	DATE	AMOUNT OF TABLETS
549	August 26, 1971	100
550	September 2, 1971	100
551	September 8, 1971	100
552	September 20, 1971	75
553	September 27, 1971	75
554	October 1, 1971	100
555	October 12, 1971	100
556	October 15, 1971	100
557	October 22, 1971	100
558	October 25, 1971	75
559	October 29, 1971	100
560	November 2, 1971	100
561	November 5, 1971	100
562	November 9, 1971	100
563	November 12, 1971	100
564	November 16, 1971	100
565	November 19, 1971	100
566	November 22, 1971	100
567	November 24, 1971	100
568	November 30, 1971	100
569	December 3, 1971	100
570	December 7, 1971	100
571	December 10, 1971	100
572	December 13, 1971	100
573	December 17, 1971	100
574	December 20, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
575	December 22, 1971	50
576	December 24, 1971	150

COUNTS 577 THROUGH 606

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, James B. Frazier, as follows:

COUNT	DATE	AMOUNT OF TABLETS
577	August 27, 1971	50
578	September 3, 1971	75
579	September 27, 1971	75
580	October 1, 1971	75
581	October 4, 1971	75
582	October 8, 1971	50
583	October 12, 1971	75
584	October 15, 1971	75
585	October 18, 1971	100
586	October 20, 1971	50
587	October 23, 1971	50
588	October 26, 1971	50
589	October 30, 1971	50
590	November 4, 1971	50
591	November 8, 1971	50
592	November 17, 1971	50
593	November 22, 1971	50
594	November 29, 1971	50
595	November 30, 1971	50
596	December 3, 1971	100
597	December 13, 1971	50
598	December 20, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
599	January 7, 1972	100
600	January 11, 1972	50
601	January 17, 1972	75
602	January 21, 1972	100
603	January 25, 1972	75
604	February 1, 1972	50
605	February 4, 1972	50
606	February 7, 1972	75

COUNTS 607 THROUGH 639

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Dennis Smith, as follows:

COUNT	DATE	AMOUNT OF TABLETS
607	August 30, 1971	75
608	September 2, 1971	50
609	September 24, 1971	50
610	September 28, 1971	50
611	October 1, 1971	50
612	October 4, 1971	50
613	October 8, 1971	50
614	October 12, 1971	50
615	October 15, 1971	50
616	October 18, 1971	50
617	October 22, 1971	75
618	October 26, 1971	50
619	October 29, 1971	100
620	November 2, 1971	50
621	November 5, 1971	50
622	November 8, 1971	50

COUNT	DATE	AMOUNT OF TABLETS
623	November 11, 1971	50
624	November 16, 1971	50
625	November 19, 1971	50
626	November 24, 1971	75
627	November 29, 1971	50
628	December 1, 1971	50
629	December 4, 1971	50
630	December 14, 1971	50
631	December 16, 1971	50
632	December 22, 1971	50
633	December 24, 1971	75
634	January 7, 1972	50
635	January 12, 1972	50
636	January 17, 1972	50
637	January 26, 1972	75
638	February 1, 1972	50
639	February 9, 1972	100

A TRUE BILL:

/s/ John Valdemar Reistrug
Foreman

/s/ Harold H. Titus, Jr.
Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 3, 1972

THE UNITED STATES OF AMERICA

v.

THOMAS W. MOORE, JR.

Criminal No. 1350-72

U. S. Mag. No. 22-531-72

Violation: 21 U.S.C. 841(a)

(Unlawful Distribution and Dispensation of Controlled Substance)

The Grand Jury charges:

COUNTS 1 THROUGH 5

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II, narcotic drug controlled substance to, Bobby J. King, as follows:

COUNT	DATE	AMOUNT OF TABLETS
1	September 27, 1971	50
2	January 5, 1972	50
3	January 5, 1972	50
4	January 10, 1972	50
5	January 10, 1972	50

COUNTS 6 THROUGH 9

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified

amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Karen Bryan, also known as Lynn A. Ryan, as follows:

COUNT	DATE	AMOUNT OF TABLETS
6	February 2, 1972	50
7	February 4, 1972	50
8	February 8, 1972	100
9	February 9, 1972	150

COUNTS 10 THROUGH 14

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Ivan Gower, as follows:

COUNT	DATE	AMOUNT OF TABLETS
10	September 3, 1971	100
11	January 28, 1972	50
12	January 31, 1972	100
13	February 4, 1972	100
14	February 7, 1972	100

COUNTS 15 THROUGH 18

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to Forris Ensor, as follows:

COUNT	DATE	AMOUNT OF TABLETS
15	August 27, 1971	100
16	November 17, 1971	100

COUNT	DATE	AMOUNT OF TABLETS
17	November 19, 1971	100
18	January 4, 1972	100

COUNTS 19 THROUGH 21

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Herbert Bruce Holland, as follows:

COUNT	DATE	AMOUNT OF TABLETS
19	August 30, 1971	100
20	February 8, 1972	100
21	February 9, 1972	100

COUNTS 22 THROUGH 26

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to Roger Wheeler, as follows:

COUNT	DATE	AMOUNT OF TABLETS
22	August 26, 1971	50
23	December 22, 1971	50
24	December 23, 1971	50
25	December 24, 1971	50
26	February 4, 1972	50

COUNTS 27 THROUGH 32

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to William N. Burgee, as follows:

COUNT	DATE	AMOUNT OF TABLETS
27	January 25, 1972	50
28	January 28, 1972	100
29	February 1, 1972	150
30	February 2, 1972	100
31	February 7, 1972	150
32	February 9, 1972	150

COUNTS 33 THROUGH 34

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, Jerome Brooks, as follows:

COUNT	DATE	AMOUNT OF TABLETS
33	September 30, 1971	50
34	February 9, 1972	50

COUNTS 35 THROUGH 38

On or about the dates hereinafter specified for each count, THOMAS W. MOORE, JR., the defendant herein, within the District of Columbia, knowingly and unlawfully distributed and dispensed the hereinafter specified amounts of 10 milligram dolophine tablets, a Schedule II narcotic drug controlled substance to, James B. Frazier, as follows:

COUNT	DATE	AMOUNT OF TABLETS
35	August 27, 1971	50
36	February 1, 1972	50

COUNT	DATE	AMOUNT OF TABLETS
37	February 4, 1972	50
38	February 7, 1972	75

A TRUE BILL:

_____

Foreman

_____

Attorney of the United States in
and for the District of Columbia

[TRANSCRIPT OF SEPTEMBER 12]

• • • •

[5] THE COURT: Now, the other matter that we have apart from discovery—and, I assume Dr. Moore and his counsel have complete discovery—The problem that I have is that I think that the defense is entitled to a more explicit statement of the theory of your case.

[6] MR. ALTO: Yes, your honor. I would be glad to do that.

THE COURT: Would it be best to do that by way of a Bill of Particulars, or would it be best to do that by some oral statement, or how do you want to do that?

MR. ALTO: I expressed to Mr. Brown my theory of the case over the telephone yesterday.

THE COURT: You see, the Court kind of wants to be in on it, too, since I have to try it.

MR. ALTO: Yes. I would like to tell your Honor the theory of the case. I will start at the end first and then trace it back to the beginning. I don't want to appear to be too basic with the Court.

The theory of the Government's case is that the doctor was conducting methadone maintenance when he wasn't authorized to, contrary to law.

THE COURT: Not authorized by statute.

MR. ALTO: Not authorized by statute and not authorized by registration with the Federal Food and Drug Administration.

THE COURT: That is a regulation requirement or statutory requirement?

MR. ALTO: Well, I started at the end, and that is the reason I would like to go a little bit back to the beginning, because it is a little complicated in the sense of the [7] statute.

Of course, we have the Controlled Substance Act statute dealing with these regulations. We have exceptions within that statute as it applies to particular scientists. One of the scientists is, of course, a medical doctor, who can, if he is registered with the appropriate federal agency, dispense the controlled drugs within the course of his professional practice.

The statute also provides that the Attorney General of the United States has the authority to promulgate rules and regulations governing these registrations.

There are two types of registrations a doctor can get. One is with the BNDD, which is a registration to give out prescriptions solely for the purpose of detoxifying with respect to methadone.

The second registration is called an IND registration, which is one obtained by a doctor with the Federal Food and Drug Administration. IND means investigation of new drug. And, that is a registration that entitles a doctor to conduct methadone maintenance.

In Dr. Moore's case, the evidence would show—I proffer this—that his IND registration was revoked prior to the dates alleged in the indictment. He still retained during the time of the dates in the indictment until the present [8] date his registration with BNDD authorizing him to give out prescriptions.

Now, with respect to the regulation that governs the registration or scope of the registration that he had, I refer your Honor to the Attorney General's rules and regulations cited in the Federal Register, Volume 36, Number 80, dated April 24, 1971, Part II. On Page 7799 the regulations go into the governing rules with respect to prescriptions. And, the Government would rely on the Section numbered 306.04. And, the two main sections or the two main parts of that section that apply to this case, that is, the specific theories of the Government's case, is section (a) which states in part: "A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner, acting in the usual course of his professional practice."

It is the Government's contention and theory that the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and secondly, that he was not acting in the usual course of his professional practice.

The second aspect of that regulation is part (c), which states in part: "A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the

purposes of continuing his dependence upon such drugs." [9] It is the Government's contention that these prescriptions were issued to maintain these drug addicts as drug addicts, and that he was not issuing these prescriptions to detoxify them, but retaining them as drug addicts.

So, that really all boils down to the end result of what I stated, that he was conducting methadone maintenance or maintaining drug addicts rather than detoxifying them as he was only authorized to do by his regulations, and by his violation of these regulations he violated 841(a) of the CSA.

THE COURT: I will take that statement which you made, Mr. Alto, in the nature of a Bill of Particulars, and limit your proof accordingly, and it will be of notice to Mr. Brown as to the theory of the case.

MR. ALTO: Yes, your Honor.

THE COURT: Are there any other problems that we need to deal with today? Have you had discovery, Mr. Brown?

MR. BROWN: Yes, your Honor, except we would like an opportunity to obtain copies of the records of Dr. Moore that the Government intends to produce. At this time we have no way of refreshing his recollection.

MR. ALTO: No problem.

THE COURT: You will have access to any exhibits or anything of that kind that is going to be used. There will be no problem.

[10] MR. ALTO: No problem with that at all, your Honor. Mr. Brown can come to my office any time and examine those records any time he wishes.

THE COURT: If they are Dr. Moore's records, he is entitled to make copies.

MR. ALTO: He can make copies.

THE COURT: Is there anything else?

MR. BROWN: Just one thing for the record, if your Honor please. I would ask leave of the Court to file a Motion to Dismiss the Indictment pursuant to such interpretation that I give to the Bill of Particulars.

THE COURT: You are always free to do that. We want to get that out of the way before trial if it is not

going to be acted upon favorably. So, you had better get at that.

MR. BROWN: Fine.

• • • •

[DIRECT EXAMINATION OF BOBBY KING]

• • • •

[59] Q Okay. Now, when you went to Dr. Moore's the first time, what happened, what occurred?

A You mean the procedure we went through?

Q Yes. When you first went there, did you apply when you first went there?

A No.

Q Okay. Would you explain to the Court and the jury what occurred then when you first went there?

A When I first went there, I went there with a friend, and my friend, he was in the program, he was getting the methadone, and we was sharing—he would pay half and I would pay half—and he would obtain the methadone.

Q What would you do with the methadone, your share of it?

A We would split it; and I would take mine and he would take his.

Q Now, how much of that methadone were you taking during that time?

A I don't exactly know the exact amount I was taking, but I was taking enough to get high.

Q To get high?

A Yes.

Q What do you mean? Will you explain to the Court and jury what you mean by taking enough to get high?

A Well, my friend explained to me about how much I was [60] supposed to take, and I proceeded from there. Probably take a spoon, teaspoon, little teaspoon, and see the effects of that, and take more if necessary for me to get high.

Q Now, where would you share with your friend, this methadone that he got from Dr. Moore?

A I am sorry, I didn't understand.

Q Where would you share it; where would you divide it up?

A Occasionally on the street. Some time we would go to the school, my house, I live around the corner.

Q Did there come a time when you, yourself, actually applied to see Dr. Moore?

A Yes, there did.

Q Why was that?

A My friend, it was near the end of school, he left to go back—school was out and he left to go back home to Boston.

Q That caused you to apply at Dr. Moore's yourself, is that right?

A Yes.

Q What happened when you went in there to apply?

A You mean the procedure, right?

Q Yes.

A The nurse asked for some ID, stating my age, my required age, and I be 21. I showed her the necessary ID. She give me some forms to fill out and she put an X where I [61] was supposed to sign my name. She said: Make sure you read the statement.

I read the statement and signed my name, as necessary, and filled out the proper data on each one.

Q What happened after you filled out these forms?

A She—I was given an urinalysis.

Q How was that? How were you given the urinalysis?

A She gave me a cup and I went in the back to the bathroom and I gave her an urinalysis.

Q Was anybody back in the bathroom to watch you do that?

A I gave her urine for urinalysis.

Q Was a supervisor or anybody there watching you give the urine?

A No.

Q Was any other physical examination given you?

A No.

Q Was your blood pressure taken?

A No.

Q Was your weight taken?

A Yes, my weight was taken. Yes, my weight and height.

Q Now, after that occurred, what happened then, after that?

A I don't recollect exactly, but she told—I think she told me to—oh, yes, she gave me a form to fill out and to go to B & W Laboratory on Georgia Avenue. I was supposed to go [62] there; and I never did go. But she told me to come back the next day.

Q Did you go back the next day?

A Yes, I did.

Q Did she question you about getting that done or getting that form filled out?

A No.

Q Okay. What happened then the next day when you went back there?

A I went back and got in proper line-up and I saw the Doctor.

Q How long did you wait before your name was called?

A Well, occasionally, I made it a habit of being at least in the first ten or fifteen.

Q Okay.

A So, approximately, a half hour wait.

Q When your name was called, were any other names called with your name?

A Some people that before me was called, yes.

Q And a grouping of how many would be called at one time?

A Five, approximately five.

Q Where would you all go then?

A We would proceed in the back to the nurse's station I would suppose; and we would then wait individually to see [63] the Doctor. And she would call us off individually to see the Doctor. We would go behind to see the Doctor individually.

Q The first time you saw the Doctor, when you were called into the office, will you describe what occurred?

A I went in to Dr. Moore's office and, yes, he looked at my arms. Well, he questioned me about heroin, and everything. I don't know the exact questions. I know he

questioned me; and then he looked at my arms; and asked a few more questions; I suppose; and then he gave me my prescription, my methadone.

Q Did he give you a liquid or prescription the first time you went there?

A It was liquid.

Q How much did he give you, do you recall?

A I don't know the exact milligrams, how much it was. I know it was half a bottle.

Q A half a bottle?

A Yes.

Q Did he tell you how to use it?

A The direction was on the bottle. Yes, the direction was on the bottle.

Q Okay. Did you take that out with you, take it home with you?

A Yes.

Q And when you left there, how much of that did you take?

[64] A I would take enough to get high.

Q To get high. How often were you going back to Dr. Moore when he was giving liquid methadone?

A Approximately every two days, I suppose; sometimes every day depending upon what I took.

Q Okay.

A How much I took.

Q Were you also getting high when you took the methadone you got?

A Yes, I was getting high.

Q Now, Mr. King, there came a time when Dr. Moore began to write prescriptions for Dolophin pills, is that correct?

A Yes.

Q And did you go to him with reference to getting prescriptions for methadone in pill form?

A Dolophin?

Q Dolophins, yes.

A Yes.

Q What would happen when you would go for the Dolophin prescriptions?

A The procedure?

Q Yes.
A He used—it was the same procedure as for methadone. The nurse would call approximately five individuals, and we would go in the rear to the nurse's station, and you would see [65] the Doctor individually, each person, as before, with the methadone.
Q What would happen when you would be called into the office?
A Well, I would go into the office and the Doctor would—he would say—the first time, the first few times I went in the office, he prescribed 50 pills, 500 milligrams.
Q Fifty pills, right. What would he usually say to you, if anything, when you first walked into the office; or what did you say to him?
A Well, later on in the program, when I walked into the office, he would say: What can I do for you?
Q And what would you say?
A Well, depending upon the amount of money I had, I would either say, 100 pills or 50, depending upon the amount of money I had.
Q What were the fees he charged?
A I think approximately $35 for 100 pills.
Q Did you say $35 for how many pills?
A One hundred pills.
Q How many for 50?
THE COURT: You mean $35 for a prescription to take to the drugstore?
THE WITNESS: Yes.
THE COURT: For a hundred pills?
[66] THE WITNESS: For a hundred pills, right. $15 for a prescription for 50 tablets.

BY MR. ALTO:

Q Okay. Do you know how much he charged for a prescription for 75 tablets?
A No.
Q Did you ever get a prescription of 75 tablets?
A Not as I recollect.
Q $35 for a hundred and $15 for fifty?
A Yes.

Q And where would you take these prescriptions to be filled?
A There was three drugstores, Associate, Petworth, and—Associate, Petworth—
Q Prescription Shop?
A Prescription Shop.
Q And would they fill these prescriptions for you?
A Yes, they would.
Q And would they charge you money for filling the prescription?
A Yes.
Q What would it cost to fill a prescription, say, a prescription for 100?
A $5.25, I think.
Q What would they charge for a prescription for 50 pills?
[67] A $2.50, I think.
Q Now, what were you doing with these pills?
A I was taking the necessary amount for me to get high; and I sold the rest.
Q Okay. How much were you selling them for?
A A buck and a half.
Q Okay.
THE COURT: A pill?
THE WITNESS: A buck and a half for each tablet.
THE COURT: Per tablet?
THE WITNESS: Yes.

BY MR. ALTO:

Q You were selling them on the street, were you?
A Yes.
Q Now, when you first started getting prescriptions from Dr. Moore, how many a day were you taking?
A When I first started, I was taking approximately two to three per day.
Q Did it increase or decrease as you kept on going back?
A My tolerance rose and, therefore, my individual—well, the amount of pills for me to get high increased.
Q How many pills were you taking at the end per day?
A Approximately 30, 35 pills per day.

Q When did you first become addicted to methadone?
A I can't remember the exact date, but it was some time [68] in—are you saying liquid methadone or the tablet, Dolophin?
Q Were you addicted to methadone before you went to Dr. Moore?
A Let's see. Yes, I would say so.
Q You were addicted to methadone before you went to him?
A My friend and I, when we was going together, I got addicted during that time.
Q Okay. When you were getting the prescriptions from Dr. Moore, approximately how often were you going there?
A That depended upon the amount I got the day before or how many I sold; but, approximately, I would go there approximately once a day or every other day and sometimes—I can remember once or twice—twice a day.
Q You went there twice a day?
A Yes.
Q On some occasions?
A I think in one or two cases, twice.
Q How would you do that?
A Well, the Doctor, he had a program where you could see him between the hours of 12:00 and 2:00 and the hours between 5:00 and 8:00. I would go there between 12:00 and 2:00 and also between 5:00 and 8:00. But I didn't do this no more than once or twice.
Q And would you get a prescription each time?
[69] A Yes.
Q Did he ever question you about your having been there earlier in the day?
A No.
Q Did he ever ask you how many of those pills you were using?
A No.
Q Did he ever tell you how many to use to detoxify?
A Well, he didn't say how many to use to detoxify, but the directions was on the bottle after you received it from the individual prescription shop.

Q Did Dr. Moore ever give you any directions, he, himself, give you any directions on how to use these pills, how many to take?
A Well, he told me not to try—not to try to use the pills intravenously.
Q You mean inject them?
A Right.
Q Can you inject those pills?
A It can be done.

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[CROSS-EXAMINATION OF BOBBY KING]

[109] THE COURT: You had no regular appointments?
THE WITNESS: I had no regular amount. In other words, I would get—
THE COURT: My question is not amount. Did you have regular appointments with the Doctor? Did he expect you to come back at a particular time, instruct you to come back at a particular time?
Do you follow what I am saying to you? I am not talking about the amount. Say you were in Tuesday. Did he set a time for you to come back again?
THE WITNESS: No, he didn't really set a time. I came back on my own.
THE COURT: So you came back when you had the money?
THE WITNESS: Right, the money and—right, the money.
THE COURT: The dosage, then, was based on what you could buy?
[110] THE WITNESS: Correct.

[DIRECT EXAMINATION OF KAREN BRYAN]

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[134] Q Did you have occasion, Officer Bryan, to visit the offices of Dr. Thomas Moore at 1520 9th Street, Northwest?

A Yes, I did.

Q Directing your attention to February 2, 1972, did you visit his offices then?

A Yes, I did.

Q What occurred when you went in the office?

A I went into the office and approached the secretary, and I said: May I please see the Doctor?

[135] And she asked me for an ID; and I handed—

Q Excuse me, Officer Bryan. Can you get a little closer to the microphone so I can hear you all the way back here.

THE COURT: She asked you for an ID, you say?

THE WITNESS: Yes, sir; and I handed her an ID made under the alias of Lynn Ryan.

Q Okay.

A And she partially filled out some forms and handed them to me to fill out.

Q About how many forms were you given?

A There were approximately four, five.

Q And what did you do? Did you fill out those forms?

A Yes, sir.

Q What happened next?

A I handed her the jacket and she put it in a pile of other new applicants.

Q After that was done, what did you do?

A I waited in the waiting room until my name was called.

Q How long was it before you name was called?

A Maybe an hour, an hour and a half.

Q Okay. What happened then after your name was called?

A I and about four, five others went into a hall-type room adjacent from his office, and the nurse asked to see my marks; and I showed her my arm; and she took my blood pressure and my weight; and I had to give a urine sample.

[136] Q Okay. Was anybody present when you gave this urine sample?

A No, sir; I closed the door behind me.

Q Did you do anything to the urine?

A No, sir.

Q Now, were you a user of narcotic drugs in any way?

A No, sir.

Q What happened after she took the blood pressure, the weight, and you gave the urine? What happened after that?

A We were called one at a time into Dr. Moore's office.

Q And after you went through this various testing, did you go back in the waiting room or wait in line?

A No, sir; we stood in the same group; and then we were called one-by-one into his immediate office.

Q How many were in the group waiting to see him?

A There were about five or six of us, sir.

Q Where were you waiting with relation to his office?

A We were waiting in the hall, which is right beside it.

Q Were you all standing or sitting?

A We were standing at the time.

Q What were you in that line?

A In the middle, sir.

Q Okay. Now, there came a time you were called into the Doctor's office?

[137] A Yes, sir.

Q Will you describe to the Court and the jury what transpired when you went into the Doctor's office?

A Yes, sir. I went in and he asked me what he could do for me; and I said, I would like some Dolophins.

He said: Let me see your trackmarks. And I showed him my arm. And he wrote me a script for 35 Dolophins—50 Dolophins, excuse me.

Q Now, did you have anything on your arm?

A Yes, sir, I did.

Q What did you have there?

A I had marks that were given to me by a doctor at the police clinic.

Q What kind of marks were they?
A Needle marks.
Q About how many were there?
A Seven.
Q And were they on both arms or one?
A Just one.
Q Did the Doctor look at both your arms or just one arm?
A Just one.
Q Did he ask to look at the other arm?
A No.
Q Was there any other conversation with Dr. Moore at that time?
[138] A None that I can recall.
Q How long were you in the office?
A Not more than three minutes.
Q What did you do then? What happened next?
A I went out and I tried to give the nurse the money, to pay for the script, because I didn't pay Dr. Moore at the time. And I said: How much is it for the visit?
She said, she looked at me, and kind of laughed. So she said: Nothing. And I walked out. And I went and had my prescription filled.
Q Where did you get it filled?
A Up the street at Associates.
Q Okay. And did you receive the filled-out prescription from the drug store, Associates?
A Yes, sir.
Q Was that prescription eventually taken to the United States Chemist at the Bureau of Narcotics and Dangerous Drugs?
A Yes, sir, it was, sir.
Q When was the next time you went back to Dr. Moore, if you did?
A I went back on the 4th.
Q Two days later?
A Yes, sir.

Q What happened when you went in the office there?
A I went into the office and I handed the woman my I.D., [139] and she pulled my jacket; and then I waited until my name was called.
Q About how long did you wait?
A About an hour, an hour and a half.
Q Approximately how many people were in the office while you were there?
A I would say approximately 40 or 50 people, but it is hard to say, because as people were going into his office and leaving, there were more coming in. So it is really hard to say.
Q Okay. So you waited until your name was called. Was anybody else's named called when your name was called?
A Well, he took groups at a time and we waited in the hall, the same as when I was there a couple days before. About four, five of us.
Q Now, there came a time when you were called to go into the Doctor's office, is that correct?
A Yes, sir.
Q And what happened this time, on February 4?
A I went into his office and he said: What can I do for you?
I said: I would like 50 more.
And he wrote me a script for 50 Dolophins; and I gave him $15.
Q Any other conversation?
A No, none that I can recall.
[140] THE COURT: You say you gave him $15. Did he determine that or did you just hand him that?
THE WITNESS: No, sir, that was the price.
THE COURT: Who quoted the price to you?
THE WITNESS: It was common knowledge in the waiting room; everybody talked price.

BY MR. ALTO:

Q Did he accept the $15.
A Yes, sir. I gave him a twenty and he gave me five back.

Q Did you receive from Dr. Moore any directions as to how to use these pills?
A No, sir.
Q Did you receive any other physical examination beside blood pressure, weight, and the giving of a urine specimen?
A No, sir.
THE COURT: Did you receive that examination on the second visit?
THE WITNESS: No, sir, that was on the first time.
THE COURT: Just on the first visit.

BY MR. ALTO:

Q Was there any subsequent examination after that?
A No, sir.
Q On the second visit, did Dr. Moore ask to look at your arms?
[141] A No, sir.
Q Did Dr. Moore make any reference to the urine results?
A No, sir.
Q When is the next time you went back, if you did?
A I went back on the 8th.
Q Four days later?
A Yes, sir.
Q And what transpired when you went back on the 8th?
A Well, it was basically the same thing. I went in and I handed the nurse my ID; and she pulled my jacket; and when my name was called, and I went into his office, I asked him for 100 pills this time.
Q Let me stop you. How long did you wait this time before your name was called?
A It was a pretty long while, because there were people in and out. He had lawyers in there asking for affidavits; and he was on the phone a lot.
Q Okay. When your name was called, other names were called also, is that correct?
A Yes, sir.
Q You waited in line, right?

A Yes, sir.
Q What happened when you were called into the Doctor's office on February 8?
A I asked Dr. Moore for a prescription for 100 Dolophins.
[142] Q And what did he do?
A He gave me a script for a hundred pills.
Q Did he say anything else to you?
A None that I can recall.
Q Was any payment made to him?
A I paid $35 for that script.
Q Did you give that $35 to Dr. Moore?
A Yes, sir.
Q And did he accept it?
A Yes, sir.
Q When was the next time you went back?
A The next day.
Q February 9?
A Yes, sir.
Q What happened on February 9?
A I went into the office and I handed the woman my ID card; and she pulled the file; and it was only—it was really kind of confused that day because there were hardly any more Dolophins left in the City, and people were really getting panicky, and they were trying to get in to see the Doctor.
Q How many people were in that office that day?
A It was really hard to say because there were just so many. I know that there is seating capacity for about 25 people in his office; and we were sitting on laps and sitting on the floor and on the front steps, and it was—it is really [143] difficult to say, sir, how many, maybe about 80 people.
Q Did there come a time you got to see Dr. Moore that day?
A Yes, sir.
Q And what occurred when you were called into the office?
A He was on the phone at the time and he was apparently on hold; and I asked him—
He looked up and said: What can I do for you?

And I said: 150.
And he gave me a script for 150; and I gave him $50.
Q $50?
A Yes, sir.
Q Did he receive and accept the money?
A Yes, sir.

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[DIRECT EXAMINATION OF FORRIS ENSOR]

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[170] Q Okay. Now, do you recall about when you started going back to Dr. Moore to get Dolophin prescriptions?

A The end of August. Like I said, I am not positive of the date.

Q Okay. Approximately how often were you going to Dr. Moore to get the prescriptions?

A In the beginning?

Q When you went to get the prescriptions?

A Well, in the beginning, I was just going like once a week. It began to be twice a week; and I think the most it ever was was three times a week.

Q How many of those Dolophin pills were you taking in the beginning when you first went to get the prescription?

A How many pills?

Q Yes.

[171] A Between, I guess between five and ten in the beginning.

Q Now, were you getting high in the beginning on taking between five and ten?

A Not really, real high, but I was feeling nice, you know, because I hadn't taken anything for three weeks, but I still was really sick, I still had the habit, but I just again, I just like tried to get off, but I couldn't. I guess I could have if I wouldn't start it again.

Q How many of those pills did you need in the beginning just to stabilize yourself, that is, to keep from getting sick?

A I guess about five.

Q About five. Now, as you went to Dr. Moore, did your in-take of pills increase or did it decrease?

A Did I increase my pills?

Q Yes.

A Yes, sir, I did.

Q What did you increase them to?

A Well, like I said, I was taking between five and ten; and then I started taking fifteen and then twenty and then twenty-five and thirty. I got up to—I got as far as, I think the most I ever ate was almost seventy.

Q You say, almost 70. You mean 70 pills at one time?

A Right.

Q Why did you do that?

[172] A Because after a while, I was eating so many, that if I wanted to feel good or feel high, I would have to eat that many.

Q What determined how often you went back to Dr. Moore to get a prescription?

A Well, usually when I ran out, I would go back.

MR. BROWN: I am sorry, I didn't hear the answer.

THE COURT: "Usually when I ran out, I would go back."

BY MR. ALTO:

Q What were the fees Dr. Moore charged you for the prescriptions?

A $35.

THE COURT: For what?

BY MR. ALTO:

Q For how many pills?

A $35 for a hundred pills.

Q Did you ever get a prescription for 50?

A No, sir, I got one prescription for 75. That was just one.

Q What were all your other prescriptions?

A A hundred.

Q A hundred. What was the fee for 75?

A I think it was $25. I only got it once. I am not real positive. I think it was $25.

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[174] Q Mr. Ensor, I am going to hand you a packet of 26 prescriptions marked Government's Exhibit No. 5.

Please keep them in chronological order and examine them to determine if they were prescriptions given to you by Dr. Moore.

A Yes, sir, they are mine.

Q Are they all prescriptions Dr. Moore gave you?

A Yes, sir, they are; they have my name on them.

Q What is the starting date, the first prescription, [175] and the last date?

A The first one is 8/—

Q 27?

A I think, either 8/27 or 8/11.

THE COURT: Seventy-one?

THE WITNESS: Seventy-one. And the last one is 1/4/72.

BY MR. ALTO:

Q January 4, '72. Were they all for 100 except for one, which is 75?

A Yes, sir.

MR. ALTO: If Your Honor please, the Government moves the admission into evidence of Exhibit 5.

THE COURT: It may be received without objection.

(Whereupon, Government's Exhibit No. 5, previously marked for identification, was received in evidence.)

BY MR. ALTO:

Q I see from the prescriptions, Mr. Ensor, that you got a prescription on October 28 for 100, and went back the next day and got a prescription for 100, also, two days in a row. Does that sound right?

A No, it doesn't. I never went back two days in a row. [176] I am sure of that. I have gone back, like I went one day and skipped a day and went back, but I am almost positive I never went two days in a row. I think maybe the days are wrong.

Q You used to go back every other day sometimes?

A I have done that but I know I never went back, like, today and then the next day, because I never did; I know that.

Q You would go back sometimes every other day?

A Yes, sir.

Q Did you ever have any conversation with Dr. Moore with respect to your being back there so soon?

A Well, a few times he said, you know, he said that—you know, he said: Weren't you just here?

And he said: Try not to come so often.

But that is about all.

Q Did you ever have any conversation with him with reference to how many pills you were taking?

A In the beginning, he would tell me—he told me to take five pills in the morning and five pills in the evening.

Q Did he tell you that, personally?

A Yes, sir. And he also had it written on the prescription blank.

Q Okay. Did you ever have any further conversation with him after that, after the beginning, about how many you were taking and why you were coming back so often?

A No, sir.

[177] Q Did you ever sell any of those pills?

A No, sir.

Q Did you ever get any directions from Dr. Moore on detoxifying?

A When I first went there, the Doctor said that I would have to detoxify myself in 21 days; but I never heard any more about it after in the beginning; so I just kept coming.

Q In other words, after the 21 days, you kept on going back?

A Yes, sir.

Q And you kept on getting prescriptions for a hundred, is that right?

A I couldn't hear you.

Q And you kept on getting prescriptions for a hundred?

A Yes, sir.

Q Did you have any other conversation with him about detoxification?

A Not except in the beginning.

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[REDIRECT EXAMINATION OF FORRIS ENSOR]

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[194] Q Now, when you went to this doctor in Baltimore to be detoxified in ten days, was that to be detoxified from methadone addiction or Dilaudid addiction?

A Methadone.

Q Where had you picked up that methadone addiction?

A From Washington.

Q From Dr. Moore, is that correct?

A Right.

Q The prescriptions show, Mr. Ensor—I want to ask you a question—in August, you got 1,000 milligrams, September, 4,000, October, 6,000, November, 7,000 milligrams, December, 7,750 milligrams.

Did you ever have any conversation with Dr. Moore why you were getting an increase in milligrams each month and why he was giving them to you?

A No, sir.

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[DIRECT EXAMINATION OF ROGER W. WHEELER]

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[202] Q Did Dr. Moore ever question you about your coming back, how many pills you were taking, or what you were doing with them?

A He might have but I don't recall.

Q Did you ever sell any of these pills?

A Well, a friend of mine that I knew was using methadone was sick, or something, one day, I might, but not very often at all.

Q The prescriptions show that all of your prescriptions except for two out of the 48 were for 50 Dolophin pills. The two were for a hundred. Now, what determined the amount that you got from Dr. Moore?

A The amount of money I had.

Q And what were the fees he charged?

A $15 for 50 and $35 for a hundred, I think.

Q Now, when you first started getting these Dolophin prescriptions, that is, the first one of August 3, 1971, how many of those pills were you taking a day?

A It is such a long time ago, I don't know. Usually I would take 15, 25. It would all depend on my mood for the day.

Q What do you mean, your mood? Were you getting high from these pills or just keeping you from getting sick in the beginning, when you were taking 15 to 25?

A I was using them to get high.

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[DIRECT EXAMINATION OF IVAN GOWER]

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[226] BY MR. ALTO:

Q Sir, would you please state your name.

A Ivan Gower.

Q How do you spell your last name?

A G-O-W-E-R.

Q How do you spell your first name?

A I-V-A-N.

Q How old are you, Mr. Gower?

A Twenty-one.

[227] Q In what city do you live?

A Baltimore, Maryland.

Q Did there come a time that you visited the offices of Dr. Thomas Moore on Ninth Street in Washington, D. C., Northwest?

A Yes.

Q Do you remember when you first went to him?

A December '69 or December '70.

Q Could it have been December of 1970?

A Yes.

Q And what was your reason for going to him?

A To get Dolophins.

Q Were you addicted to any narcotic drug at that time?

A No.

Q Why did you want to get methadone?

A Just to get high.

Q Will you get a little closer to the microphone so we can hear you back here.

You say, just to get high?

A Yes.

Q Now, what occurred when you first went to his office?

A I got weighed, blood pressure, filled out an application.

Q Okay. Did you give a urine specimen?

A Yes.

[227-A] Q Had you had any narcotic drugs in you at the time you gave that urine specimen?
A I don't think so.
Q What occurred when you first saw the Doctor?
A He asked me how I was doing, what could he do for me.
Q What did you tell him?
A I told him I wanted to purchase some methadone.
Q And what occurred then?
A He asked—well, I am not sure exactly what the exact words were, but was some talk about how much money; and I think I give him $15 and he gave me a bottle of liquid methadone.
Q So it wasn't Dolophin when you first went there, it was liquid, is that correct?
A Right.
Q Now, did you drink that bottle there or did you take that out?
A No, he gave me a small cupful there, to drink there, and a bottle to take home. It was a half a bottle.
Q Now, did you drink that methadone?
A Yes.
Q What was your reaction to it?
A Got loaded.
Q What do you mean, you got loaded, you got high?
A High, yes.
[228] Q How often did you go back to Dr. Moore to get liquid methadone?
A At least once or twice a week.
Q And did you always use that methadone to get high?
A Yes. Well, eventually, I did get addicted to it.
Q How long was it before you got addicted to it?
A Maybe, I don't know, a month or two.
Q Did there come a time, then, Mr. Gower, you got into Dr. Moore's Dolophin prescription program?
A Yes.
Q Do you remember approximately when that was?
A Around August or September.
Q Incidentally, going back to the first time you went to Dr. Moore, did he ask to look and see if you had any track marks?

A No, he didn't look at mine. He didn't look at my arms, no.
Q When you went back to get Dolophin prescriptions, were you given any examination at that time?
A I can't remember. I may have and may not. I don't know.
Q The first time you went there for Dolophin pills, what occurred?
A Just asked me how many did I want; and I told him; and I gave him the money; and I got the prescription.
[229] Q How often would you go back to get those pills?
A Couple times a week usually.
Q What determined how often you went back?
A How much I had.
Q What were the fees that Dr. Moore charged?
A I think it was $15 for 50 and $25 for 75 and $35 for a hundred; and I think it was $55 for 150.
Q Now, why did you go back—you were on the liquid program. Why did you go back and get the Dolophin prescriptions?
A Well, he stopped dispensing liquid.
Q All right.
A I think he was down for a week or something, I am not sure, and then he started giving out the prescriptions.
Q When you used to go in his office once or twice, three times a week, how many people would be in the office there?
A Usually couldn't—just about get in the door.
Q Could you make an approximation?
A Maybe about a hundred, I don't know, 75.
Q What would happen, generally, when you would walk in?
A Gave your name to the nurse, receptionist, and she take your folder out and lay it down.
Q What would you do then?
A I had a card at one time and she would put the date on the card, on the appointment card.
[230] Q Then what would you do after she pulled your folder?

A Sit down and wait until my name was called.
Q How long did you usually wait?
A It would be an hour and a half, two hours.
Q What would happen when your name was called?
A Go in the hall and wait.
Q Were any other names called beside yours when your name was called?
A Usually called maybe two or three at a time.
Q Where would you all go?
A Into a hallway; and he would take us in one-by-one.
Q And what, generally, would happen every time you would go in there?
A The same thing. Just ask me what he could do for me; and I would tell him.
Q Did he ever give you any directions on how to use the Dolophin pills?
A Once in a while he would ask me how many I was taking a day; and I would tell him. That was about it.
Q Did he ever give you any advice that you were doing wrong or that you should do it this way?
A Not that I can remember.
Q Did you ever have any discussions with Dr. Moore during the time you were getting these prescriptions about detoxification?
[231] A I think one time I got arrested and I wanted —I was afraid I was going to go to jail; and I asked about getting detoxified; and I think he said something like that he had too many patients and didn't have the time, you know, to work with just me alone, whatever —something to that effect—about detoxifying me, I mean, that is, increase my dosage. Because at that time, I was pretty well addicted.
Q Did you ever go there two days in a row?
A I think so.
Q Did you ever have any argument with Dr. Moore during the time that you were getting these prescriptions?
A Once or twice about money, if I was short money.
Q What were the arguments about?
A Might be a couple dollars short, and he would say, you know, a lot of people were coming to him and telling

him that they were short money, and he just couldn't do it any more; and I would go out and borrow the money from other people and come back in and get my prescription.
Q Now when you first started getting Dolophin prescriptions from Dr. Moore, how many a day were you taking?
A This isn't including the liquid, right?
Q This is after the liquid.
A Just the Dolophin?
Q Dolophin prescriptions.
A It is hard to say. Usually, anywhere from ten to 60.
[232] Q How many of those pills did you need to maintain yourself, that is, to keep from getting sick, in the beginning?
A I'd say around ten at the most.
Q And how many did you need to take to get high in the beginning?
A This is the Dolophins, right?
Q Yes.
A About 20.
Q About 20. Now, were you always taking those Dolophin pills to get high?
A At first. Well, I don't know. After a while, no I was taking them to keep from getting sick.
Q And how many were you taking when you stopped going to Dr. Moore in February a day?
A Twenty-five, 30 a day maybe. I have taken as high as 60 at one time.
Q Why did you take 60?
A To get high, because tolerance increased, increased.
Q Your tolerance increased and increased?
A (Witness nods assent.)
Q Did you ever sell any of those Dolophin pills?
A A few. If I couldn't get the money up to get a prescription, yes.
Q What was the selling price? What would you sell them for?
[233] A A dollar apiece.

Q Did there come a time when the price rose?
A Yes.
Q And when was that?
A When they closed down.
Q When Dr. Moore closed down?
A Yes.
Q What did the price rise to?
A About $2 apiece.
Q Are you drug-free now, Mr. Gower?
A Yes.
Q How did you get drug-free?
A I got arrested in May, and I was in the city jail for 20 days, and I kicked cold turkey, and I have been drug-free ever since then.

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[DIRECT EXAMINATION OF
WILLIAM N. BURGEE]

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[251] BY MR. ALTO:

Q Looking at the first prescription, when did you receive the first prescription? Does that refresh your recollection?
A I have a hard time reading this handwriting, but I think it says the 25th of January, 1972.
Q Okay. And was that for 50 Dolophin pills?
A Yes, I think so.
Q Okay. Now, looking at the second prescription, does that refresh your recollection as to the second time you went back?
A Yes, it is the 29th.
Q And how many Dolophin pills did you get on that occasion?
A 100.
Q What conversation did you have with Dr. Moore on that occasion?
A I went into his office and he asked me what he could do for me; and I told him I wanted 100 Dolophins.
Q What did he do?
A He gave me a prescription for 100 Dolophins.
[252] Q Did you pay him a fee?
A Yes, I did.
Q How much was that?
A $35.
Q Now, looking at the third prescription, does that refresh your recollection as to the third time you went in there?
A Yes, it was the 1st of February, 1972.
Q How many Dolophin pills did you get on that occasion, February 1?
A 150.
Q Was there anything in the conversation with Dr. Moore on that occasion that was different than the other two conversations you had with him?
A To the best of my recollection, no.

Q Okay. When is the next time you went there?
A I can't really read this handwriting too well. I think it is February 3.
Q Did you ever go two days in a row?
A I don't think I did. So far I haven't here.
Q Okay. The fourth prescription you got, how many pills did you get on that occasion?
A 150.
What date is this, is that the 3rd?
Q This would be the fourth prescription, isn't that [253] correct, Mr. Burgee? How many did you get on that occasion?
A 100.
Q Okay. And you paid a fee to Dr. Moore?
A Yes, I did.
Q What was the fee you paid?
A $35.
Q Was there any different conversation with him than the other conversations you described?
A Only the fee for 150, it was $50.
Q When was the fifth time you went there?
A February 7.
Q How many did you get on that occasion?
A 150.
Q Did you have any conversation with Dr. Moore on that occasion when you asked for 150 Dolophin pills?
A To the best of my recollection, no.
Q Will you describe what happened when you went into the office and you requested 150?
A He wrote a prescription for 150.
Q Did he say: What can I do for you?
A Yes, or something similar.
Q Did he question you or have any conversation with you with respect to your asking for the increased amount to 150?
A I don't believe so.
Q And what was the fee he charged for the 150 Dolophin [254] pills?
A Fifty Dollars.
Q Now, when was the last time you went to Dr. Moore?

A February 9, 1972.
Q And you said the time before that was February 7?
A Yes.
Q How many did you get on February 9?
A 150.
Q And was the fee $50?
A Yes, it was.
Q Was there any conversation with Dr. Moore that was different from the other conversations you had with him?
A To the best of my recollection, no.
Q Did Dr. Moore ever give you any directions on how to use these?
A The prescription bottles had, as directed for detoxification.
Q But did Dr. Moore, himself, ever give you any directions as to how to use these for detoxification?
A No.

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[DIRECT EXAMINATION OF JEROME BROOKS]

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[261] BY MR. ALTO:

Q Had you ever been addicted to narcotic drug prior to that time?

A Yes, sir.

Q How long before you went to Dr. Moore's were you addicted to a narcotic drug?

A About five years.

Q Now, how did you get unaddicted to a narcotic drug before you went to Dr. Moore's?

A I was in jail for nine months.

Q And how long had you been out of jail before you went to Dr. Moore's?

A About five months.

Q And you were not addicted at the time you went there, to Dr. Moore's?

A No, sir.

Q Why did you want to get methadone?

A To get high.

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[264] BY MR. ALTO:

Q Mr. Brooks, what did the Doctor give you on that first visit? Did he admit you into his program?

A Yes, sir.

Q What did he give you?

A One bottle of liquid methadone.

Q To go or to drink there?

A To go. I drank a small dose there and I had the bottle with me.

Q What did you do with that methadone, use it to get high?

A Uh-huh.

[265] Q How often did you go back to Dr. Moore on the liquid?

A At first it was every two or three weeks, I think; and then it builds up, so you start going once a week.

Q You say it builds up. What builds up?

A You get a habit and, you know, your tolerance builds, you have to take more.

Q And did you develop the habit on methadone?

A Yes, sir.

Q How long was it before you developed a habit?

A It is hard to say, you know. You develop a mental habit first, and then, you know, the next thing you know, you wake up and you have the physical habit.

Q Did you have occasion after the liquid program ended to go to Dr. Moore to get Dolophin prescriptions?

A Yes, sir.

Q Did you have a habit at that time?

A Yes.

Q How often would you go to see him to get Dolophin prescriptions?

A I tried to make it once a week.

Q And what would happen when you would go in the office to get Dolophin prescriptions?

A He would ask how many I wanted, and 50, 75 or a hundred; he told me the price; and I told him how much I wanted; and I paid him.

[266] Q What were the prices?

A It was $15 for 50, $25 for 75, and $35 for a hundred.

Q And what determined the amount you got?

A He asked me, you know, how many I wanted. If I wanted 75, he would give me. If I wanted a hundred, he would give me.

Q What determined how often you went back there or how many you would get?

A What do you mean, what determined it?

Q What determined the frequency of your visits to Dr. Moore?

A Me.

Q You?

A Uh-huh.

Q Did the Doctor ever schedule a set of appointments for you?

A No.

Q Did he ever give you any directions on how to use these pills?

A I think on the bottle it said, Detoxification.
Q On the bottle. But did he, himself, ever give you any directions?
A I can't say for sure, you know.
Q Did Dr. Moore ever tell you how to detoxify with these pills?
[267] A No.
Q Now, in the beginning, when you were first getting the prescriptions, how many of the pills a day were you taking?
A I guess five or so, started out taking.
Q And at the end, when you left Dr. Moore, when he closed down, how many were you taking?
A The last time I took them, you mean?
Q Yes.
A About 30.
Q Now, in the beginning, how many did you need to keep from getting sick, just to maintain yourself?
A Pills, you mean.
Q Yes.
A I guess 30, 40 milligrams, three or four pills.
Q Three or four pills? Were you taking those pills to get high or to keep from getting sick?
A To keep from getting sick.
Q Now, did the habit build up? Did your tolerance build up as you went?
A Sure.
Q And were you getting high any times that you took those pills?
A At first, you know, you get high, like you get, or something, and afterwards, it just builds up so fast. One week you get high, and two weeks later, you know, your tolerance [268] just builds so fast.

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[270] Q Now, while you were getting these Dolophin pills [271] from Dr. Moore, did you ever sell any on the street?
A When I needed money.
Q Well, my question was, did you sell any?
A Yes.

Q When you needed money for what?
A To get more.
Q To get more. What price did you sell them at?
A A dollar apiece.

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[DIRECT EXAMINATION OF
HERBERT B. HOLLAND]

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[285] Q Did there come a time when you stopped the liquid program and you went and got Dolophin prescriptions from him?

A Yes, it was.

Q How often would you go to him to get Dolophin prescriptions?

A I'd say on an average two, three times a week—two times a week.

Q And what would happen when you would go in and get the Dolophin prescriptions?

A I would go in there; the secretary would take my name; and she would get my folder out and put it in line, you know, on top of the other ones; and when it was my turn, he would call me in the office and he would ask me how many would [286] I need.

Q What would you say?

A Well, if I had enough money, if I had $40, I would say: Could I have a hundred Dolophins.

Q Would he give you a hundred?

A Yes.

Q Did he ever question why you wanted so many or how many you were taking?

A Not to my knowledge.

Q How long would these visits last when you would be in his office?

A Not long.

Q How long, would you say?

A About 30 seconds—about a minute.

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[291] Q How many pills were you taking in the beginning when you were getting those prescriptions?

A Approximately ten, fifteen pills.

Q Were you getting high?

A No—well, a little bit, little bit. I wasn't getting high, as people say high. I was taking more than I should have to stay straight, but I wasn't getting high.

Q You say you were taking how many, in the beginning, of the pills?

A Approximately ten, maybe fifteen.

Q That is 100 to 150 milligrams, is that right?

A That is right.

Q How many were you taking in the end of February when you got the last prescription a day?

A Anywhere from 30 to 60, 60, 65 sometimes.

Q In other words, anywhere from—

A Three hundred milligrams to 650 milligrams.

Q Did you ever have any conversation with Dr. Moore about the fact that you were down to 40 milligrams and that you were getting all of these prescriptions, 33 of them in four months? Any conversation with him about that, your detoxifying?

[292] A No, sir.

Q Now, the prescriptions show that in August, August 30, you got one prescription for a hundred, that is 1,000 milligrams; September, three prescriptions for 2,250 milligrams; October, four prescriptions for 2,250 milligrams; November, six prescriptions for 5,000 milligrams; December, nine prescriptions for 7,750 milligrams.

Did Dr. Moore tell you that this was how he was going to detoxify you?

A No. I would just come in and get my prescription and cash it and then go take my medication.

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[DIRECT EXAMINATION OF
KENNETH A. BROWN]

[359] BY MR. ALTO:

Q Officer Brown, will you state for the record your full name.
A Kenneth A. Brown.
Q And your occupation?
A Police officer.
Q Where are you assigned, Officer Brown?
A Sir, I am assigned to the Narcotic Branch, Metropolitan Police Department.
Q How long have you been assigned to the Narcotics Branch?
A Assigned to the Narcotic Branch May 18, 1969.
[360] Q For how long have you been a police officer?
A Five years in January, sir.
MR. ALTO: If Your Honor please, I am waiting for the Marshal to bring out some exhibits I have to show the witness.
THE COURT: Yes.

BY MR. ALTO:

Q Officer Brown, I hand you Government's Exhibit 20-A, and ask you to examine the contents, and ask you if you had occasion to have that in your custody?
MR. BROWN: What was the question? I am sorry.
THE COURT: Whether he has had that exhibit in his custody is the question, I believe, Mr. Brown.
MR. ALTO: Yes, sir.
THE WITNESS: Yes, sir.

BY MR. ALTO:

Q Government's Exhibit 21-A, will you examine that exhibit and I ask you if you have had occasion to have that in your custody?
A Yes, sir, I have
Q Finally, Government's Exhibit 19-A, have you had occasion to have that exhibit in your custody?
A Yes, sir, I have.

Q Now, Officer Brown, did you have occasion to identify any prescriptions amongst those three exhibits issued by Dr. Thomas Moore?
[361] A Yes, sir.
Q How did you identify the prescriptions as being written by Dr. Moore?
A Sir, those were prescriptions which were identified by the Doctor's label, by the Doctor's BNDD registration number and by the Doctor's signature.
Q Did you have occasion to count all of the prescriptions issued by Dr. Moore between September 1, 1971 and February 11, 1972 for Dolophin tablets?
A Yes, sir.
Q And what was the total count of the prescriptions issued for methadone?
A Sir, the total number of prescriptions written by Dr. Moore for Dolophin tablets during the period September 1, 1971 through February 11, 1972 was 11,169.
Q Did you further break that down and count the prescriptions in accordance with the number of pills that were prescribed?
A The number of pills, sir?
Q Yes, the number of Dolophin tablets that were prescribed in each prescription?
A Yes, sir.
Q How many prescriptions during that period of time were issued by Dr. Moore for 50 Dolophin tablets, of ten milligrams?
A During that period of time, sir, 5,486 prescriptions.
Q And how many prescriptions were issued by Dr. Moore [362] for the quantity of 75 ten-milligram Dolophin tablets?
A Sir, during that period, a total of prescriptions for 75 was 1,126.
Q And how many prescriptions were issued by Dr. Moore for the quantity of 100 ten-milligram Dolophin tablets?
A Sir, for that period, for 100, a total of 100 Dolophin tablets, the number is 4,225.
Q And how many were issued during that period of time for 150 tablets?

A Sir, 214.
Q And how many for 200?
A A total of 9, sir.
Q And do you have any others?
A Yes, sir. There were 109 miscellaneous.
Q What is the range of those, of the number of tablets prescribed, within the 109 miscellaneous?
A Ranging from 15 to 300.
Q Okay. How many of the 300 were there?
A There were five, sir.
Q Did you further break it down, Officer Brown, into total number of prescriptions issued by Dr. Moore per month, beginning on September 1?
A Yes, sir.
Q How many total prescriptions were issued by Dr. Moore in September?
[363] A The total was 807, sir.
Q And in October?
A The total for October was 1,765.
Q And November?
A Total for November was 2,370.
Q In December?
A Total for December was 2,660.
Q January?
A The total for January was 2,524.
Q And from February 1 through February 11?
A From February 1 through February 11, the total was 1,043.
Q Now, Officer Brown, did you further break down by date the dates that Dr. Moore issued over 100 prescriptions?
A Yes, sir, we did.
Q On how many dates did he issue over 100 prescriptions?
A A total of 54 days.
Q And is that in between that period, September 1 to February 11?
A Sir, the time period is from September 20 through February 9, 1972.
Q Are there any days he issued over 200?
A Yes, sir.

Q How many?
A There were two days, sir.
[364] Q And what two days were they and what number?
A November 29, 1971, a total of 206 prescriptions; and on January 5, 1972, there were a total of 271 prescriptions.

[DIRECT EXAMINATION OF
DR. DAVID H. FRAM]

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[386] BY MR. ALTO:

Q Let me start with respect to the Psychiatric Institute, your Drug Rehabilitation Center. How do you treat drug addicts there by the use of methadone?

A The part of the treatment that includes methadone, the methadone is used in two major ways: One is for detoxification and the other is for maintenance.

Detoxification involves giving an addict a dose of methadone that is roughly equivalent to the amount of heroin they were using, and giving successive diminishing doses until they are not taking any methadone.

Methadone maintenance involves prescribing a set dose of methadone daily, and continuing that.

Q Okay. Now, Doctor, say a person comes to the Psychiatric Institute and states that: I have a heroin problem; can you help me? What steps from the beginning does your Institute take?

A Well, the first thing we would do would be to conduct an evaluation. This would involve myself or other psychiatrists involved in the program doing a psychiatric evaluation. It would involve all of the staff members conducting their own evaluation of the individual as to, one, whether he is an addict, and what the nature of the addiction problem is, and what the [387] nature of the underlying difficulties leading to the addiction are.

Also, a physical medical exam is conducted as well on all the people that come, which includes laboratory tests and chest X-ray.

Q What kind of laboratory tests, to determine what?

A Well, mainly to determine if the individual is physically well. Large numbers of the addicts that we have seen have had difficulties with their liver; and a number have had venereal disease, and so on. We have conducted the examinations to determine whether individuals have these illnesses and get them treated if they need it.

Q Doctor, is a fairly thorough physical examination that you have described important in the treatment of drug addicts?

A I would say it is extremely important. Again, large numbers of the addicts we have seen have been ill, and they need medical treatment.

Q Now, the phychiatric consultation, you said that is initially done. How long is that consultation or observation period?

A From 45 minutes to an hour.

Q And then the physical examination, what occurs after that?

A Well, we, in essence, get all our data together. Each patient is discussed at a case conference of all the staff, and [388] we try to put the whose case together, figure out what kind of treatment is needed, and then talk with the patient about what our recommendation is.

Q When you say, what kind of treatment, are you referring to whether it is going to be detoxification or maintenance?

A Among other things. Also about the psychotherapeutic aspects of the treatment, as well, and why is the person addicted and what happens to be involved in getting over their problem.

Q Upon what criteria do you determine that a person that has come to you for help should be detoxified?

A Well, first of all, we want to, as much as we possibly can, determine that they are taking heroin or methadone. We have gotten a number of people who come to us on methadone; and our attitude is that unless it becomes clear that a person cannot make it on maintenance, we detoxify the person. So maybe a better way to put the question is, how do we decide when to maintain people.

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[393] BY MR. ALTO:

Q Doctor, in the Institute, do you ever write prescriptions for methadone for an addict to go to a drug store and get methadone?

A No, I do not.

Q Now, even in your maintenance program, do you ever write prescriptions for an addict to get methadone in a drug store?

[394] A The only way methadone is ever dispensed in the program is by the nurse, either to be consumed in front of her, or when it has been determined that the patient can take out a certain amount, the nurse gives that amount to the patient.

Q Now, Doctor, I would like to give you a hypothetical set of facts for purposes of the questions I am to ask you thereafter.

Would you please assume that the hypothetical facts are true. Assume that a patient goes in to a doctor's office to be detoxified from heroin use; and that he fills out various forms there; and that the physical examination that is given is his blood pressure is taken, his weight is reported, and he is asked to give an urinalysis.

He then waits; he goes in to see the doctor. The doctor says: What can I do for you? The doctor might ask him to see his track marks. And the patient says: I would like 50 Dolophin pills. The doctor then writes out a prescription for 50 ten-milligram Dolophin pills and he is charged a fee of $15.

Assume further that the patient comes back three days later, goes through the same procedure, goes into the doctor's office and the doctor says: What can I do for you? He says: I would like 75 Dolophin pills. The doctor writes out a prescription for 75 Dolophins, charges $25.

Assume the patient comes back two days later, gets a prescription for a hundred Dolophin pills; and then comes back [395] thereafter over a period of 22 weeks, 48 times, where he receives prescriptions ranging from 50 Dolophin pills to 100 Dolophin pills.

Now, Doctor, is that the accepted medical practice within the District of Columbia in treating addicts?

A No, it is not.

Q I didn't finish the question.

—with respect to detoxifying addicts, is that accepted medical practice?

A No.

Q Is that accepted medical practice, even with respect to maintaining addicts?

A Not for that, either.

THE COURT: Doctor, you have described your procedures.

THE WITNESS: Yes.

THE COURT: Do you have any information as to whether or not your procedures generally conform with medical standards in medical practice in the District?

THE WITNESS: Yes, our procedures conform with the standard as the Drug Abuse Committee of the Medical Society has recommended be used in treating programs of this sort.

THE COURT: When was that done; what date was that done? When were those standards set?

THE WITNESS: Those standards were set some time in '71, as I recall.

[396] BY MR. ALTO:

Q Doctor, are your practices in the Institute consistent with the other drug treatment programs within the District, for instance, the Narcotics Treatment Administration?

A Consistent with it, yes.

Q I believe you testified, when I was going into your qualifications, that you are familiar with programs throughout the country that treat addicts by the use of methadone.

A Yes.

Q Is your method consistent with these other methods throughout the country?

A Yes, they are.

Q Is the hypothetical set of facts I have given you consistent with any method that you know of throughout the United States that is accepted by the medical profession in this country?

A Not that I know of.

Q Now, Doctor, assuming further—and I think I did cite this to you in the hypothetical, but to repeat it—that the doctor charges the patient $15 for a prescription for 50 pills, $25 for a prescription for 75 pills, $35 for a

prescription for a hundred pills, and $50 for a prescription for 150 pills. Is that acceptable medical practice in this city?

A I would say not. Accepted medical practice is that the physician treats the patient and charges for that. If a [397] prescription is given, that is part of the treatment. What the prescription is or how many pills are given does not determine what the price is.

Q That is not acceptable medical practice to charge by the amount that is given in the prescription?

A That is right, yes.

Q Now, Doctor, we have gone into detoxification and how the methadone is given, and everything. What supportive services do you have with respect to helping the addict?

A Well, we have—maybe I should describe our program. We offer psychotherapy and job counseling, primarily. Our therapy involves the patient coming to three group meetings a week, which are conducted by a psychiatrist and ex-addict counselor, working as a team. The ex-addict counselor is present in the clinic all of the time, and meets with the patients informally, in informal groups, and in individual sessions, as the patients are coming in. Our nurse also is involved as a counselor, as well. She knows all the patients and counsels them as they are coming in. Our job counselor also is involved initially with all the patients and is helpful to them in both getting jobs and also in figuring out what kind of jobs makes sense for them, what their difficulties have been prior to that in getting jobs and holding jobs.

I would take issue with your referring to those as supportive services. I see the methadone as supportive and this [398] as being the heart of the program.

Q Oh, my terminology, I am sorry.

Doctor, in line with the hypothetical I gave you, do you recall the hypothetical set of facts I gave you?

A Yes.

Q What are the medical dangers with respect to that type of program?

A Well, first of all, one has no idea how much methadone the individual is taking. One doesn't know whether

he is taking it, whether somebody else is taking it. You don't know whether a child is taking it. If you are trying to detoxify a person, you don't know whether the person is being detoxified or whether they are taking more each day. Also, you have no idea if the individual is indeed taking it at all. Maybe he is continuing on heroin and selling the methadone.

Since you didn't describe urine testing, which is twice a week also part of our program—

Q Doctor, assume this set of facts: That a person comes in and claims to be an addict, takes a urine test, prior to the results of the urine test gets a prescription for 50 Dolophin pills.

Assume further that the urine result comes back the following day, negative on everything, and that the day after that, the person comes back and gets a prescription for another 50 Dolophin pills given by the doctor.

[393] Assume further that four days after that, the patient comes back and gets another prescription from the doctor for 100 Dolophin pills; and assume further that the day after that, the very next day, the patient comes back and gets a prescription for 150 Dolophin pills. That is three prescriptions after the urine result comes back negative.

Now, is the giving of the prescriptions after the urine test came back negative acceptable medical practice in the treating of drug addicts by the use of methadone?

A Well, if a person's urine is negative, I would wonder if they are an addict; and I wouldn't think of giving them methadone if they weren't.

MR. BROWN: I would object to that. It is not responsive.

THE COURT: That is not a proper response. You were asked whether or not that is an acceptable medical practice?

THE WITNESS: No.

BY MR. ALTO:

Q It is not accepted medical practice?

A That is correct.

MR. ALTO: I have no further questions.

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[DIRECT EXAMINATION OF
DR. THOMAS E. PIEMME]

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[444] BY MR. ALTO:

Q Is the method you described consistent with those guidelines set out by the Medical Society?

A Yes, it is.

Q Is it consistent with the procedure followed by NTA?

A Yes, sir.

Q What other groups in the District perform this type of procedure?

A The Psychiatric Institute.

I am not familiar with the specific techniques that are used by Black Man's Development or Bon A Bond. I think they are probably inclined to achieve the abstinent state more rapidly. I don't know the details.

Q From your experience with programs and your studies of programs throughout the country, is the description you gave of detoxification generally consistent with these programs throughout the country?

A Yes, it is.

Q Now, the medication, itself, in detoxification, [445] Doctor, how is it administered?

A Well, that differs from program to program. First of all, almost all of the well-known programs, the major ones in the country administer the methadone on site, under direct observation of the staff. It is usually administered in a liquid form and the liquid methadone is put into Tang, or some other kind of vehicle. It is perfectly obvious. Although several of the programs are now going to large capsules that are large enough that they can be managed by an adult but not by a child.

Q Is the addict, in detoxification, given a number of these capsules to take home, or how does that work?

A No. As we take somebody into our program, whether he is going to be detoxified or maintained on methadone, as most of our patients are for some period of

time, the methadone is administered in the clinic, daily, under direct visualization of the staff.

After four to six weeks in the program, provided that the urinalyses show no abuse of other drug, provided that they have attended all of their therapy sessions, their psychotherapy sessions, and those sessions meet twice weekly, and provided that there is common agreement by the staff that the patient is being entirely honest and cooperating well with the program, then we will give them weekend privileges, that is, allow them to take two doses home for Saturday and Sunday. But for [446] the remaining five days of the week, they still come to the clinic and take their methadone under direct visualization.

Q Doctor, the third aspect of rehabilitating addicts, maintenance, will you describe to the Court and the jury what the accepted medical technique in methadone maintenance is?

A There are two approaches to methadone maintenance. At about 40 milligrams of methadone daily, one can stop the addict's craving for heroin. He is still, however, able to override the methadone, that is, if he uses heroin, he will still get the rush, and still get the high.

There are some patients for whom it is appropriate simply to curb the craving while one is proceeding with rehabilitation counseling and therapy. For many patients, however, curbing the craving isn't enough. For whatever reason, they still go out in the street and still use heroin. One then uses a dose of 80 milligrams or more, which is a so-called blocking dose, that is, 80 milligrams of methadone a day; and even if one goes out in the street and shoots heroin, he will get no sensation from it, so there is no point in using it.

This is why the large-scale programs, Dr. Dole's in New York, NTA here, Dr. Jaffe's program in Chicago, for the most part, achieve the blocking doses to prevent the addict from going out in the street and using heroin; there would be no point to it.

THE COURT: That is around the level of 80 milligrams [447] a day?

THE WITNESS: That is around the level of 80 milligrams of methadone a day.

BY MR. ALTO:

Q Now, the addict who is on maintenance in all the programs you know of, how is the methadone administered on the maintenance aspect of treating the addict?

A Again, on every program it is administered on site until the patient has earned so-called weekend privileges by cooperating with the program, attending all the counseling sessions, and the staff would agree that the patient is reliable, trustworthy, to take the doses home. Everyone is, of course, concerned with the take-home doses about the issue of diversion, diverting the methadone to the street, to the use of persons for whom it has not been intended.

Q Doctor, is it acceptable medical practice in initially treating addicts that they be given a physical examination?

A Yes, it is.

Q What physical examination should be given?

A Well, certainly, there is initially the necessity to determine, if one can, the veracity of whether or not he is an addict, that is, does he have needle marks, does he have tracks, are his pupils constricted, does he exhibit the signs that we associate with dependence upon heroin. Moreover, people who are addicts are subject to other diseases, hepatitis, bacterial [448] endocarditis. I think every addict is entitled to a complete physical examination like any other patient who would come to a physician is entitled to a physical examination to determine the state of his health.

Q Is that the commonly accepted medical practice in the programs you know of, to give an examination that covers these areas, to determine if he has these diseases?

A It is indeed.

Q Doctor, for the purposes of asking you a question that is to follow, I want to ask you a hypothetical question, and I ask you to assume that the facts I am about to give you are true.

Assume that a patient comes into a doctor's office, and he claims that he is an addict ;he fills out various forms. A nurse them administers to him, takes his blood pressure, weighs him, and sends him to the bathroom to give a urine specimen.

Assume then that he goes in to see the doctor; the doctor asks him what he can do for him. The doctor might ask him to see his track marks. The patient then requests Dolophin tablets, ten milligrams. The doctor writes out a prescription for 50 ten-milligram Dolophin tablets. The patient then leaves; fills out the prescription.

Assume further that the patient comes back eight days later, goes in to see the doctor. The doctor says: What can [449] I do you you? And the patient says: I would like some more. And the doctor writes out a prescription for 50 ten-milligram Dolophin tablets.

Assume further that the same procedure persists eight days later, 50 Dolophin tablets; three days after that, 50 Dolophin tablets; ten days after that, 50 Dolophin tablets; three days after that, 50 Dolophin tablets; two days after that, a hundred Dolophin tablets; six days after that, 50 Dolophin tablets; two days after that, 50 Dolophin tablets; four days after that, 50 Dolophin tablets; five days after that, 50; five days after that, 50; two days after that, 50; five days after that, 50; three days after that, 50; two days later, 50; three days later, 100; three days after that, 50; two days after that, 100; three days after that, 100; two days after that, 100; one day, the following day, 100; three weeks later, 50; three weeks later, assume the date is January 5, he comes in during the doctor's office hours between 12:00 and 2:00, and the same procedure happens, and the doctor gives him a prescription for 50 Dolophin tablets; and four hours later, he comes back during the doctor's evening hours, he requests another prescription, and the doctor writes him a prescription for another 50 ten-milligram Dolophin tablets; and then five days later, returns, follows the same procedure, goes in the afternoon, gets a prescription for 50; goes in the evening and gets a prescription for 50; and two days after that, he comes back and gets 100 Dolophin tablets; [450] five days after that, he gets 100; two

days after that, 100; two days after that, 100; four days after that, 50; the following day, 100; two days after that, 50; three days after that, 50; three days after that, 100; and four days after that, 100.

Did you generally follow that, Doctor.

A I followed it.

Q Assume further that the breakdown is that in September, '72, he received 500 milligrams; in October he received 3,500 milligrams; November, 3,500 milligrams; December, 6,500 milligrams; January, 8,000 milligrams.

Now, assuming those facts to be true, is that acceptable medical practice in this city in detoxifying a narcotic addict through the use of methadone?

A No, that is not acceptable medical practice.

Q Is that acceptable medical practice?

A That is not acceptable medical practice in any program that I know of anywhere in the country.

Q Is that acceptable medical practice, Doctor, even with respect to maintaining an addict?

A No, it is not acceptable medical practice for methadone maintenance.

Q Assuming those facts to be true, what are the medical dangers contained within those facts?

A Well, one could postulate risk to the patient from [451] an overdose of methadone; but I think we would all strongly suspect that the patient is not using the methadone. There is then risk to those people to whom he may be giving or selling the methadone, risk to people who might inadvertently come across his supply of methadone. There have been instances of small children, one in this city, two years of age, who died from consuming methadone that was left around the house.

I think those are the risks: Overdose death, not only to patients but to others who may inadvertently use it or to whom it may be sold.

Q What would be a lethal dose of methadone taken by a person who is not addicted, people like you or I or members of the jury?

A I think about 60 milligrams would be a lethal dose for anyone who is not narcotic-dependent; and for a

child, 20 milligrams, depending on the size of the child, could be a lethal dose.

Q Now, Doctor, I am going to ask you to assume another set of hypothetical facts.

Assume the facts I gave you previously were true. Assume further that the doctor charged a fee of $15 when he wrote a prescription for 50 ten-milligram Dolophin tablets; charged a fee of $25 for 75 ten-milligram Dolophin pills; charged a fee of $35 for 100; and charged a fee of $50 for 150.

Is that acceptable medical practice?

[452] A That is not only not acceptable medical practice; that is unethical medical practice.

MR. ALTO: No further questions.

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[CROSS EXAMINATION OF
DR. THOMAS E. PIEMME]

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[459] Q Now, you had indicated further that the blockage level for stultifying, shall we say, an addict's craving for heroin is around approximately 80 milligrams a day?

A Eighty to 120 milligrams a day.

Q Eighty to 120 milligrams a day. Now—

A I am sorry. You say, block the craving. One can [460] abort the craving at 40 milligrams a day. At 80 to 120 milligrams a day, one then blocks the effect of heroin that may be used to override the methadone.

Q I see. Then am I to understand that in order to go beyond blocking the craving, in an effort to block the effect of heroin, it necessarily entails an increase in the doses of methadone to be given to a patient until you reach that level?

A I am not sure I understand.

Q Well, you said that the craving for heroin can be blocked with approximately 40 milligrams.

A That is correct.

Q Is that right. Now, in order, however, to completely prohibit the euphoria that a patient would obtain—

A That is true.

Q —from using heroin, you would have to raise his dosage, would you not, sir?

A That is correct.

Q Now, in that same regard, I again state that your answer to what that amount was, that is ordinarily necessary to prevent the euphoria, is approximately 80 milligrams?

A That is correct.

Q Is it not true, however, Doctor, that where you have a patient who has a high heroin habit, $100 a day, or $300 a day, that he would require possibly a greater amount of milligrams than 80 in order to prevent the euphoria he would [461] obtain from using heroin?

A I am doubtful that he would require more than—no, I am doubtful that he would require more than 100 at the maximum. Even the largest habit one could conceive, it is doubtful he would require more than 100.

Q You feel 80 milligrams a day, regardless of the habit which the addict has, would be sufficient to block the euphoria, is that your testimony?

A That is correct.

Q Now, what about the patient who comes to a doctor, who has already acquired a methadone habit by virtue of previously being in a program, does he not have a high degree of tolerance?

A There are some who do, yes.

Q And do they not require a higher dosage of milligrams in order to obtain the desired effect?

A No, those people—and there are some on record—who have been on very, very large doses of methadone daily, on the order of 150, 200 milligrams of methadone daily, can very quickly, within a matter of a day or two, be brought down to 80 to 100 milligrams of methadone a day and maintained there.

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[DIRECT EXAMINATION OF
AGENT WILLIAM J. MILLER]

[491] BY MR. JOHNSON:

Q Tell me this, sir. What other artifice, if any, did [492] you employ?

A The evening before and then that morning before we came down to Washington, I had taken a pin and placed some pin marks, surface-type pin marks on my right arm, from approximately my wrist up to my elbow.

Q What was the purpose of putting those marks on your arm?

A The same purpose as the clothing, to look like an addict.

Q Beg your pardon, sir?

A The same purpose as the clothing, to look like an addict.

Q Was that to imitate what they call track marks, which you are familiar with as track marks?

A As best that I could. It wouldn't actually be track marks.

Q Now, when you got there, did you give your right name?

A Yes, sir, correct name.

Q Did you have an ID?

A Yes, sir.

Q Did you give your correct ID?

A Yes, sir.

Q And what ID did you have?

A A Maryland Motor vehicle Driver's license.

Q I see, sir. And you didn't give your police [493] identification?

A No, sir.

Q Did you inform the nurse that you were—what if anything did you tell the nurse?

MR. ALTO: I think we ought to have the foundation and dates, if Your Honor please.

BY MR. JOHNSON:

Q Will you tell us what date it was you went there?
A The first date I went there was on January 13, 1972.
Q Now, on that date, did you give a sample of your urine?
A Yes, sir.
Q And what did you tell the nurse on that day about heroin, if anything?
A Nothing.
Q You didn't tell her you had a heroin habit?
A She gave me some forms to fill out.
Q I see. Did you put down that you were a heroin addict?
A Yes, sir.
Q How long did you say you had been a heroin addict?
A I can't really recall, honestly. Probably two years, as best I can recall.
Q How much of a heroin habit did you say you had?
A There, again, I can't really recall. I would be guessing. I would say ten-bag a day, or something like that.
[494] Q Now, you didn't make up this format without some help, did you, or did you make it up on your own?
A I made it up on my own because I didn't know there was a format, that that was the format until I got in there.
Q Is it your testimony, sir, you didn't need any help to know how to masquerade as an addict?
A Well, my own practical knowledge that I derived from the job.
Q And you tried in every way you knew how to masquerade as an addict?
MR. ALTO: Objection. Calls for a conclusion, leading the witness.
THE COURT: Sustained.

BY MR. JOHNSON:

Q Was there anything else that you could have done, from your expertise, your knowledge as a narcotic officer, was there anything else you could have done to make more complete your masquerade as an addict?

A Yes, sir.
Q What else could you have done?
A I could have put methadone in my urine.
Q You could have done that? You didn't do that, sir?
A No, sir.
Q Did he take a sample of your urine?
A Yes, sir.
[495] Q And did he give you a prescription?
A Yes, sir.
Q Now, did there come a time when you returned to him?
A Yes, sir.
Q Did he take your urine that time?
A Yes, sir.
Q Was that the second time?
A Yes, sir.
Q Now, what date was it, the second time?
A That was January the 18th, 1972.
Q Sir?
A January the 18th 1972.
Q Now, did you come with the same dress or did you use any different dress?
A Basically, the same. I had another jacket; I had an army jacket which I wore.
Q I see. Did you do anything else other than what you did when you first went there?
A I didn't do as much as I did the first time.
Q I beg your pardon?
A The marks that I had were no longer present. I did not put them on again.

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[CROSS EXAMINATION OF
AGENT WILLIAM J. MILLER]

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[502] Q Okay. Now, the second time you went back, I believe you testified, was January 18?

A Yes, sir.

Q What happened when you went into his office then?

A On the 18th, I went up to the nurse and presented my driver's license, which I used the first time for identification. She got my file out of the file cabinet, placed it in a pile with the other ones.

I began waiting around. I waited for approximately I believe it was two hours, quite some time, until I finally got in line and lined up with the approximately five people that were waiting to go into the doctor's office.

I went into the doctor's office and sat down. He again said: What can I do for you?

I said: You had given me 50 last time, and that wasn't enough; I had to go out on the street.

[503] The Doctor said: I can give you 50, 75 or 100. Just tell me how many so we can move along here.

I said: Well, give me a hundred.

And then he said: How about you settling with me while I settle with you.

I asked him: How much?

And he said: $35.

And I paid him the $35.

Q And you got a script for a hundred?

A Yes, sir.

MR. ALTO: Your Honor, may I have this marked as Government's Exhibit—

THE DEPUTY CLERK: No. 23. Government's Exhibit No. 23 marked for identification.

(Whereupon, Dr. Moore's file on Mr. Miller, was marked Government's Exhibit No. 23, for identification.)

BY MR. ALTO:

Q I hand you what has been marked as Government's Exhibit No. 23, and ask you if you recognize your handwriting signatures on any of these items contained in that jacket?

A Yes, sir.

Q Now, do you see your name on top of any of those results of urine tests?

A Yes, sir, I do.

[504] Q Okay. What is the return date on the first urine test you took there?

A The return date is January 15, 1972.

Q What was the result?

A The result is negative for any narcotics.

Q You got a script on the 13th. Your urine came back negative on the 15th. He gave you a script for a hundred on the 18th, isn't that true?

A Yes, sir.

Q Did he say anything about the negative urine?

A No, sir, he didn't.

Q Now, these marks you put on your arm, you have dealt with addicts since you have been with the Bureau; you have seen track marks; is that correct?

A Yes, sir.

Q Were they track marks or what do track marks really look like?

A Track marks are scar tissue, the veins appear black, darker than normal. I have seen addicts with abscesses, and particularly scar marks like where the skin hasn't grown back properly.

The marks that I put on my arm were just surface pin marks, which were no more than or less than 24 hours old, every one of them.

Q Now, you gave another urine specimen that day, the [505] second time?

A Yes, sir, I did.

Q Okay. When is the next time you went back, the 24th of January?

A Yes, sir.

Q What happened when you went into his office that time?

A On the 24th, again, it was quite crowded. First of all, I had to wait in line outside. When I finally got into the building, I showed the nurse my driver's license again; she again took the folder out and placed in on top of the cabinet. After some time I finally got in line and my turn was called; and I went in the Doctor's office and sat down.

Dr. Moore said: What can I do for you?

And I said: You gave me a hundred last time. Can you give me a hundred more?

And, basically, that was the conversation. He wrote the prescription for a hundred; I paid him the $35 for it.

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[CROSS EXAMINATION OF
THOMAS W. MOORE, JR.]

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[682] Q Let me ask you this, Doctor: Is methadone an addictive narcotic drug?

A Yes, it is.

Q Is it also a dangerous drug?

A Yes, it is.

Q Is it also an abusable drug?

A If not used properly, it is dangerous.

Q Is it also an abusable drug?

A Yes, it can be abused.

Q And the form in which you were prescribing the Dolophin [683] tablets in the form in which addicts can cold cook it and inject it, is that right?

A If an addict is so—

Q Inclined?

A —inclined.

MR. BROWN: I will object. I think this witness ought to be able to answer his own question.

THE COURT: Don't interrupt the answer.

MR. ALTO: I am sorry, Your Honor.

THE WITNESS: If an addict is so inclined to do so, he can. By this process of cold cooking, I think you mean—What do you mean by cold cooking?

BY MR. ALTO:

Q What I mean, Doctor, if you could kindly give me an answer to my question, is the Dolophin pill the kind that the addict can inject?

A Yes, that is the only type that private physicians can prescribe.

Q Would you answer my question?

THE COURT: That is not the question, Doctor.

BY MR. ALTO:

Q Is a Dolophin tablet what an addict can inject?

A An addict can inject a Dolophin tablet, yes.

Q And did you promise that Grand Jury on October 22, 1974, you would not write prescriptions for methadone that could [684] be injected?

Did you promise them that?

A I don't know if I promised them. I told them I wouldn't. I don't know if I used the word, promise, or not. I might have.

MR. ALTO: Page 14, Mr. Brown.

"Question: And you will not issue methadone prescriptions to addicts or anyone else which can be injected?

"Answer: No."

Do you recall that question and your giving that answer?

THE WITNESS: Yes.

THE COURT: And that is what he has just said now on the stand.

THE WITNESS: Yes.

BY MR. ALTO:

Q Was that a promise, Doctor?

A That was a statement. It was a question and I answered it. If you see the word, promise, in there, I wish you would read it.

Q Was that a firm statement to the Grand Jury?

A That was a firm statement.

* * * *

[688] Q Now, did you also tell that Grand Jury, Dr. Moore, did you promise them that you would abide by the urine results in screening an addict?

A Yes, I did. I don't know what my exact statement was [689] but I do remember agreeing to follow a urine testing schedule.

Q Would this be your exact statement, Doctor?

MR. BROWN: Objection.

THE COURT: He is refreshing his recollection, Mr. Brown.

MR. BROWN: He needs to ask him, would it refresh his recollection.

THE COURT: Well, he is about to do it.

BY MR. ALTO:

Q "Question: And are you going to set up some screening measures and what would they be?

"Answer: Well, the main one would be urine, the screening of a patient's urine, taking a urine sample, sending it off to an appropriate laboratory and abiding by that particular result."

Is that what you said to the Grand Jury in October '70?

A If it is written there that way, then I said it.

Q Would you like to look at it, Doctor?

A No, I don't need to look at it. I will take your word for it.

Q Did you promise you would abide by the urine result?

A Is the word, promise, in there?

Q Did you make a firm statement to the Grand Jury?

A I made a firm statement.

Q I want to hand you Government's Exhibit No. 4, [690] Lynn Ryan, urine results negative all the way through; yet she got script.

Did you abide by the urine results with that patient?

A No, no, I did not.

Q How many script did you give her after the urine result came back negative?

A I gave her her initial prescription, and then I gave here three other ones.

Q Three more in increasing dosages, the last one being 150?

A 150.

* * * *

[706] Q Did you also make a firm statement to that Grand Jury that: This is going to involve more than one urinalysis; that this will be the control. As the person is taking the medicine, [707] you would have to make sure he was staying drug-free. Did you tell the Grand Jury that?

A I might have, Mr. Alto, but that was quite some time ago.

Q Let me have you look at it, Doctor, to refresh your recollection, the last question on Page 21, and the last answer.

A I see the question here to read:

"This may entail more than one urinalysis."
I want to stress that word, may.

"This may entail more than one urinalysis. It may entail several urinalyses.

"Answer: Yes. This would be the control, as the person is taking his medicine, to make sure he is staying drug free."

Q That was your answer, is that right?
A Yes, I have to abide by what was written there.
Q Doctor, you put a witness on the witness stand, a Mr. Steptol.
MR. BROWN: Objection. This Defendant put no witness on the stand; his counsel did.
THE COURT: You stand corrected, Mr. Alto.
MR. ALTO: Sorry.

BY MR. ALTO:

Q Your counsel put on the witness stand a person who testified for the defense by the name of Steptol, isn't that [708] correct?
A Yes, sir.
Q Were you making sure that that man stayed drug-free, as you told the Grand Jury?
A I understand from Mr. Steptol that Mr. Steptol now is drug-free.
Q During the time you were treating him and after you told the Grand Jury that you were going to make sure the urines were drug-free, were you abiding by that statement to the Grand Jury with Mr. Steptol?
A It arrived a point after my testimony with the Grand Jury that I decided that the guidelines for my particular program did not require a urinalysis, that in all instances was not true, you know, was not a true result. So I felt it absolutely senseless to continue, you know, a faulty procedure. They could use a test tube that was dirty, and all of a sudden, I have a patient with a positive urine result. Now, who wants to put that kind of burden on a patient.
Q Did you try to go back to the Grand Jury and tell them that you weren't going to make sure they are drug-free in their urine?

A I did not even know I had the right to go back to the Grand Jury.

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[711] Q Now, Dr. Moore, when your IND number was taken away, you only had authority and you knew you only had authority to detoxify people, is that right, addicts?
A (Witness nods assent.)
Q Can you describe to this jury what short-term detoxification is?
MR. BROWN: He has been asked the question. Was there an answer as to the first question?
MR. ALTO: You nodded.

BY MR. ALTO:

Q What was your answer to the first question?
A I will do it again if you want me to. I did it this morning but—
THE COURT: No, the problem is, Doctor, you responded by a head shake, and I guess the record doesn't show whether it was affirmative or negative.
You were answering affirmatively, were you?
THE WITNESS: I am sorry.
THE COURT: I am not criticizing you. The first question is: You knew you could only detoxify after your number was taken away?
[712] THE WITNESS: Yes.
THE COURT: All right.

BY MR. ALTO:

Q Okay. Can you describe to the jury—
A There was some difference of opinion. That was my understanding. Now, on consulting with legal counsel and their reading—
Q Which legal counsel now, Mr. Moore?
A Eventually, I discussed this problem with Mr. Brown, a long time before I hired Mr. Brown. He had been referred to me by the Dean of Howard's Law School as a good attorney; and I was in between attorneys; I didn't feel I was getting the proper legal advice. I felt that I was being grossly overcharged.

Q Doctor, let me stop you there. Mr. Jacob Stein represented you at the Grand Jury, didn't he?

A At the Grand Jury.

Q Wasn't he the President of the Bar Association?

A Now, I wish to qualify that last statement.

THE COURT: Let's not get into a discussion of the qualifications of different members of the Bar.

When did you have any reason to believe that you had authority to do more than detoxify, what date?

THE WITNESS: I don't know exactly which date, Your Honor.

[713] THE COURT: See if you can estimate it for me, then.

THE WITNESS: I can't estimate at all.

THE COURT: Very well.

THE WITNESS: But for months, I was under the opinion that all I could do was just detoxify people.

BY MR. ALTO:

Q For months. Doctor, let me hand you a prescription dated February 8, 1972, three days before you closed down.

Is that one of your prescriptions?

A Uh-huh.

Q Did you rubber stamp that?

A Yes, sir.

Q Did you rubber stamp that?

A Yes, sir.

Q What does the rubber stamp say?

A "Take as directed for detoxification." That is for a hundred tablets.

Q Doctor, isn't it a fact around November 1 all of these prescriptions have that rubber stamp, "As directed for detoxification," or do you want to look at all of them?

A No. This was done with a purpose.

Q Well, you understood what your authority was?

A Yes.

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[715] Q Doctor, what did you say to these people that came in beside, What can I do for you; that will be $15, $25, $35? [716] What else did you say to them?

A We said quite a few things. It would depend on the patient, what other problem he had. We would sit and talk. This is why I always carried them in my office where it would just be the patient and myself. He would take a seat on one side of the desk; I would be on the other. I had a radio that used to play behind my right ear, that used to scramble my voice, so anyone standing outside couldn't hear a private conversation; and the patient would talk; and I would listen; and whatever he wanted to talk about, he talked about.

Q Let me ask you this:

A Now, this, to me, was the counseling of my patients.

Q What were your office hours, Doctor?

A Well, they varied. I asked the nurses to be there 11:30 in the morning.

THE COURT: He is talking about office hours, Doctor.

THE WITNESS: Twelve to two, and five to eight; but I was never able to keep those hours.

BY MR. ALTO:

Q Doctor, let me ask you this: There has been an item admitted into evidence, Exhibit No. 22, which shows on January 5, 1972, you wrote out 271 prescriptions.

Where did you get the time to consult and talk with patients, if you were writing out 271 prescriptions—saw 271 patients?

[717] A One would have to assume from that, right there, that I talked very fast or I write very fast, and possibly both.

Q Doctor, there has been testimony in these records admitted into evidence to support that between September and February there were 54 days when you issued over 100 prescriptions, that means over a hundred patients, in your office hours. How did you counsel them? How did you motivate them? Will you tell the jury that?

A Because it was impossible for me at any time in the last three years to hold office hours between twelve and two and five and eight. That is, from twelve until whenever we finished; and sometimes we didn't finish. Sometimes we went straight through, all the way, and the neighbors used to comment. They would say: Jesus, Doctor, you overlapped yourself that time, didn't you?

• • • •

[722] Q Did you consider the aspect of those people who got their freebees selling them on the street?

A These were only given to certain patients for certain reasons, that is, no charge was made. To persons —like I said, I had to treat, and I still do treat every patient who comes in as a particular patient. I don't have a blanket set of rules [723] for my office, outside of keeping quiet and no fights and no drinking, and that sort of thing.

Q What was the rule you expressed to the jury as to why you charged $15 for a script of 50, $25 for 75, $35 for a hundred; and there has been testimony—did you charge $50 for 150?

A Fifty dollars for 150, yes.

Q How much did you charge for 200 pills?

A When I rarely gave 200 pills, I would charge—this would depend. If it was a family, say, a husband and wife—if it was just a single person, that would come to $70. Now, if both the husband and the wife were both addicted, we could see that this is—we are talking about $140 from just that one family, and we are talking about a fellow who might have a job, they are only paying him, maybe, between 75 and maybe 85 or 100 dollars a week.

Q Do you know of any other doctor who charges graduated fees, depending on the amount he writes on the prescription?

A I don't know two doctors in town that do the same procedure in anything.

Q Do you know anyone, Doctor, who charges based on the amount he writes in the prescription, graduates it?

A Yes.

Q You do, Doctor?

A Me.

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[716] BY MR. ALTO:

Q Doctor, do you agree with this statement: That if the procedure of treating addicts by the use of methadone is conceived as no more than an unsupervised distribution of narcotic drugs to addicts for self-administration of doses and at times of their choosing, then few physicians would accept it as proper medical practice, an uncontrolled supply of drugs would trap confirmed addicts in a closed world of drug taking and tend to spread addiction.

Do you agree with that statement?

A Would you read that statement to me again? It covers quite a few words.

Q If the procedure of treating drug addicts by the use [762] of methadone is conceived as no more than an unsupervised distribution of narcotic drugs to addicts for self-administration of doses at times of their choosing, then few physicians would accept it as proper medical practice, an uncontrolled supply of drugs would trap confirmed addicts in a closed world of drug taking and tend to spread addiction.

Do you agree with that?

A No, I do not agree with that because that runs contrary to exactly what I was doing.

• • • •

[V-6] Q Right, and going back to what you developed before the Grand Jury on October 22, 1970, didn't you also tell them that in the future of your program you were going to consult with Dr. DuPont and run the city program the way the Bureau of Narcotics and Dangerous Drugs said it should be run?

A Yes, but I found out that that was impossible to consult with Dr. DuPont.

Q Well how about other doctors who were running the city programs?

A The only doctor that I knew of who was running the city program, ran it and the only one was Dr. DuPont and Dr. DuPont made the point also that the city run program was to be handled their way but it

was impossible for me to consult with Dr. DuPont. Dr. DuPont was supposed to be at a series of meetings given by the D.C. Medical Society and it was [V-7] just impossible to speak to him—there were to be present these three men that were involved with Dr. DuPont in an attempt to lay out an attack against drug addiction in Washington, D.C. and surrounding areas, but none of these were at the meeting, you know, with Dr. DuPont.

Q Did you ever confer with Dr. DuPont about the matter of detoxification?

A I went down to Dr. DuPont's office and he and I had a conversation.

Q Did you talk about his program and how he detoxified and how he maintained and controlled the supply of methadone to addicts?

A No, because I already had this information on hand. One of the persons that was working in Dr. DuPont's program, one of the counsels over at 14th and Q, supplied me with this information and I was able to read it.

Q Well the fact of the matter is that you did not adjust your program as you told the Grand Jury in line with the city program or in line with what the Bureau of Narcotics and Dangerous Drugs said you ought to do or the Food and Drug Administration?

A I adjusted my program after talking with Dr. DuPont and after reading the literature that I cited in my protocol.

Q You mean the article by Lady Frankel?

A All of those articles that you have there.

[V-8] Q Well what other doctor in this country for the record has given out prescriptions in the amounts and times that you did—what other doctors follow your method?

A I don't know of any other doctor in this country that follows that method. I am not saying that there is no other doctor that follows the method but there may very well be. I just don't know of him—he has not written anything in the literature to that effect.

Q Then you will admit, Dr. Moore, that your conduct and practice was not in accordance with the standards of ethical practice generally recognized in the United States for the detoxification of addicts?

A No I cannot say that. The only thing that I can say is that my way of treating drug addiction possibly was not in accord to the way that Dr. DuPont or the way that the D.C. Med. Society would feel that drug addiction should be treated in Washington, D.C. In fact, the D.C. Medical Association took the position that they hadn't given any physician authority at all to treat any addict in his office on a patient-doctor relationship.

Q Well the D.C. Medical Society set up guidelines, isn't that right—

A Well this was—

Q They set up guidelines on April 1, 1971 as to how a private physician ought to detoxify?

[V-9] A They set up guidelines.

Q And you didn't follow those guidelines, did you?

A No, but I was at a meeting when the guidelines were presented to me and other doctors were also at this meeting—

Q So you were fully aware of those guidelines, is that correct?

A Yes I was fully aware and I have testified about the guidelines before the City Council.

Q Doctor, is there not a standard set out in these guidelines here and everywhere else in this country that within a week's time you detoxify someone to get him to hold a level where he won't get ill, and then you gradually reduce the doses until he is drug free. Is that not the standard for detoxification in the country?

A That is the standard method in Washington, D.C. but when you say if it is the standard in the rest of the country I don't know. I don't know what the rest of the country is doing. I haven't travelled in this country outside of Washington, D.C. for quite some time and I don't know what the rest of the country is doing. The only thing I know is that the rest of the country is not doing enough in the fight against drug addiction. That is one thing I do know.

• • • •

[V-22] Q And then didn't they [Federal Food and Drug Administration] send you a letter on April 23, 1971 setting out the deficiencies that you had agreed to

correct and what you had agreed to do to correct them. Do you recall that letter?

A I don't recall the letter. I recall receiving a letter—

Q You do?

[V-23] A Do you have a copy of that—does the U. S. Attorney have it?

MR. ALTO: I do. Your Honor, this is Exhibit 30.

THE COURT: Yes, you may refer to it.

BY MR. ALTO:

Q I hand you Government's Exhibit No. 30 and refer you to this letter which is dated April 23, 1971 and it is addressed to you.

THE COURT: It has been marked but you may show it to Mr. Brown.

MR. BROWN: I don't mind him looking at it, Your Honor, but we would like to be just apprised of what it is.

MR. ALTO: Well it is an exhibit marked for identification as Number 30.

THE COURT: Well Mr. Alto would you just hand it to Mr. Brown and let Mr. Brown look at it.

(Whereupon defense counsel exhibited the document marked as Exhibit No. 30 for identification)

THE COURT: Alright, doctor, you may now answer the question.

THE WITNESS: Yes, I remember receiving this letter.

BY MR. ALTO:

Q This letter?

A Yes.

Q Alright, now did it tell you that in view of the [V-24] potential danger to the public health from opportunities for diversion of methadone and of the danger to the health of individual subjects who may not be trully dependent on narcotics from administering methadone to them, that they found certain requirements to be absolute necessities in your program and that you had agreed to the following changes to be instituted immediately:

"1. Admit no new subjects to the methadone maintenance program."

Do you recall that?

A I recall that.

Q And they told you that because you had plenty of patients, isn't that right?

A No, no, they didn't tell me that for that reason. Every one of those points that you have there, I had given them while I was talking to them. These were my recommendations that on a telephone call to Dr. Scoville, I myself composed those, that whole letter.

Q But you did after you composed that whole letter, you did agree to admit no new patients to the program?

A Yes, because at that time the FDA and myself were in disagreement as to the best possible way to treat drug dependence in the Metropolitan area and I called Mr. Scoville up and I quoted to him or a spoke to him over the phone as to what steps I would take until this difference of opinion was [V-25] resolved, and what you are also reading was in gist was delivered by me, hand delivered, to the chairman of the Committee for Drug Abuse for the District of Columbia. Dr. Scoville didn't compose any of that letter—all of that language right there is mine, and the only thing he did was copy it down and then mail me a letter to that effect, after attaching that first paragraph you just read.

Q Then it is true that you yourself said "I will admit no new patients to my practice"?

A During that time over our difficulties or our disagreement—I should say, myself and the Food and Drug Administration.

Q Is it not a fact that you violated that and you did admit new patients?

A Er—after I thought—in fact, Mr. Ungar who at that point was my attorney, terminated, was explaining back and forth with Dr. Scoville by phone—I was always in Mr. Ungar's office when these phone calls were made—no, no, no, no—may I retract that?

Q Well could you just answer the question? Did you in fact admit new patients in violation of this admonition?

A Yes, yes, after—

Q As a matter of fact, Dr., is it not true that—

A After, after negotiations were undertaken by Mr. Ungar and Dr. Scoville at the FDA.

* * * *

[V-27] Q Now, doctor, is it not a fact that after this letter was sent you took into your program Bobbie King, Forris Ensor and Jerome Brooks, three of the witnesses that I have put on the witness stand?

A I wouldn't know unless I saw the records.

[V-28] Q Well here is the jacket on Bobbie King which is Government's Exhibit No. 1. What is the date that he came into the program?

A Bobbie King came into the program 6.10.71.

Q June 10, 1971, after this letter and before you got your IND terminated, right?

A What is the date of that letter?

Q April 23, 1971 and you were terminated in July, right?

A Yes, he came into the program in the next month.

Q Well where is the laboratory testing in that file on Bobbie King?

A Bobbie King, Bobbie King did not go for his examination but my records bear out as of 6.10.71 Bobbie King's records are stamped that he was received into the program and he was sent for chest-at the time he was sent for laboratory studies and he was given 44 cc's of methadone.

Q Well what were the results of that chest film, was it, at the lab and the laboratory testing?

A Bobbie King obviously didn't go. The only thing that I can do since I don't have lab facilities in my office, if this extends to the manner of testing that the Food and Drug Administration wanted—the only thing that I could do was as any other doctor, instruct the patient that it is vital that certain laboratory tests should be conducted and as [V-29] recommended at certain places, and tell him where to go and give him the address of the laboratory testing, marked off on an order form as to exactly what tests I wanted and, as a matter of fact, I contacted the man who was in charge of the BNW State Laboratory and told him what tests I needed

for the FDA and he gave me a special price, a lower price than they would normally charge. I think he told me he charged normally for that work, it was $25 and he told me if all my patients came up he would do it for $15 and I passed this information on to every single one of my patients who came in during this discussion period, this difficulty and this disagreement with the FDA—every patient that came in was instructed to go and have these tests done.

Q And Bobbie King didn't get those tests done, right?

A Bobbie King didn't get them done. He didn't go and get the testing.

Q And did it make any difference to you—it didn't, did it?

A Yes, it made a lot of difference to me.

Q But you kept on giving him methadone, didn't you?

A Because he needed it and I, as his physician, felt that I was ethically bound to give this man his medication as long as it was available.

Q Well, doctor, didn't that statement of the Food and Drug Administration say "all patients who have been in your [V-30] program of methadone maintence therapy will receive laboratory testing as outlined in the Federal Register"?

A "will receive" or may receive, but this is the only time, as I mentioned, this was the only time that we were in total disagreement as to exactly how drug dependents should be treated and Dr. Scoville—

THE COURT: Just a moment, may I interrupt you, counsel would you approach the bench?

(At the bench)

THE COURT: Mr. Brown, I think the record will reflect my patience with your man, but he is not being responsive here. He is just wandering all over the record and he isn't getting down to anything. I have not wanted to intervene and start directing him because I don't want any remark of mine to be an influence on the jury so I haven't spoken about it but I really think it has reached a point where we have to have some responsibility in terms of the administration of this trial as

reflected in the record. This man has just gone all over the lot and there is no way to control his responsiveness or anything else and, as I say, we just have to do something if this trial is ever going to end.

MR. JOHNSON: May I suggest to Your Honor that we have a five minute recess.

THE COURT: Well I have tried that before and I am not willing to try it again. I would like to move this case.

[V-31] MR. JOHNSON: Yes.

THE COURT: I just wanted to let you know that I have got to do something to see that this case proceeds in accordance with the standards. He has had ample opportunity for the jury to get a feeling of his personality and his dedication or whatever it is.

MR. BROWN: Well I would like Your Honor to know we are in complete agreement with you. We have a client who has that type of personality problem and we would not ask for a recess except in view of Your Honor's feelings just as an extra precaution before the intervention of Your Honor, is you would give us this one last opportunity.

THE COURT: Well, yes, I will do that. That is why I called you up.

MR. JOHNSON: We will speak to him, yes.

THE COURT: As I say, I have been staying out of it and it has taken some patience on the part of the court, I can assure you.

MR. BROWN: Yes, Your Honor, and it has caused some anxiety on my part, I can assure the court.

THE COURT: Oh yes, and I don't think at this stage it is helping your client, either, because he is just repeating himself. I think we ought to move along so we will take a ten minute recess at this time if that is agreeable.

MR. ALTO: Certainly, Your Honor.

[V-32] (End of bench conference)

(Whereupon a ten minute recess was taken)

MR. ALTO: Now I show you Government's Exhibit No. 6 in evidence which is the file of Forris Ensor.

Would you look in that file, doctor, and see when he came into your program?

A Mr. Forris Ensor entered my program on the 6th, 6.10.71.

Q The same day as Bobbie King, wasn't it?

A The same day as Bobbie King.

Q Was he ever sent to have laboratory testing?

A Yes he was.

Q And where are the results?

A I have no results. The patient didn't go.

Q And that didn't make any difference to you?

A Whether he went?

Q Right.

A No, it didn't make any difference to me.

Q Even though you testified you had been told that it was required in this letter that they would receive lab testing—it didn't make any difference to you?

A This was a stipulation under the maintenance program. It was never my intent to maintain the program, to maintain patients. My intent was to detoxify patients and get them off completely, off of all drugs.

Q Doctor, wasn't your testimony initially when I [V-33] showed you this letter that you are the one that composed the letter and you are the one that set out these requirements?

A Yes, that's true.

Q And Government's Exhibit No. 13, I believe, is the file of Jerome Brooks, another witness who has testified in this case. When did he come into your program?

A He entered the program on 5.28.71.

Q Was he sent for laboratory testing?

A Yes he was.

Q What were the results?

A Mr. Jerome Brooks was sent on 5.27.71 for chest film, lab testing and he never went.

Q Doctor, then you admit that the first three requirements set out by the FDA or that you claim you dictated to them, you violated, is that correct?

A As a maintenance program, yes. I never wanted to maintain patients on methadone. I wanted to make them completely drug free.

Q Did they further send out to you or did you dictate this to them:

> "In possible new subjects, monitoring by you or your delegate of ingestion or the investigational drugs by the subject, daily during the initial weeks of administration"

Did you comply with that?

[V-34] A No I did not. We are constantly talking about the maintenance program and the IND number which I totally disagreed with.

Q But you dictated this letter for the FDA, you say?

A Yes, this was—this was because this was the only thing that I could obtain, the only reason I could obtain methadone, to give to my patients, to detoxify them and make them drug free. This was the only way I could do it.

Q Was there further stipulation as to regular testing for drugs on the subject's urine collected under surveillance and the recording of the results in detail, as to relative findings adequate to establish diagnoses of current dependence on drugs, did you comply with that?

A No.

Q None of the urine was taken under surveillance, is that it?

A Only near the end of my program when I got, I got the vague impression that persons who were coming to me might not, er, might not be addicts.

Q You say at the end of your program or near the end of your program?

A Yes, at that time I would have the guard take the male patients back to make sure that it was, that the particular person urinated in the bottle, and I would have one of my nurses take the female patients back.

[V-35] Q And your program ended on February 11, is that correct?

A My program ended on February 11, yes.

Q Was January 25th near the end of your program?

A No it was not.

Q Well when did you start having urines collected under surveillance?

A When I felt that what I was hearing from my patients did not constitute what the really drug dependent person would say to a doctor when asked what his problem was and on my observation of that particular patient as a doctor, I began to have doubts as to whether certain people coming into my office were in fact drug addicts.

THE COURT: The question is: what date between the 25th of January and the 11th of February did you reach such a determination?

THE WITNESS: Honestly I don't, I don't know which date it was. It was never marked down any place.

BY MR. ALTO:

Q So, doctor, all of the guidelines they sent out to you you violated?

A I can't say all of them. You are talking about all of the guidelines in 134.44?

Q I am talking about the letter that they sent to you that you say you dictated.

[V-36] A Yes.

Q And in that statement, does it not nevertheless say "failure to comply will force us to consider terminating your IND number"?

A I didn't, if you are reading the letter, yes I would say that was generally done—that I and my attorney at that time were receiving from the FDA—

Q Just a minute, I hand you the exact statement and in the last sentence of that letter, if you will read that—

A That is the last sentence of the letter.

Q So you were warned by that that if you did not comply with these conditions you were going to be revoked?

A Yes.

Q And there came a time that they came back and reinspected you to see if you were complying with these conditions, isn't that correct?

A Yes.

Q And on June 28, 1971 they sent you a letter terminating you, isn't that right?

A I don't, I don't remember the date but the letter was hand delivered and it had a date July 28, I believed, that the number would be terminated.

Q I hand you the same exhibit, Exhibit No. 30, and direct your attention to the letter dated June 28, 1971 addressed to you. Is that the letter you received from them?

[V-37] A This is the letter I received from them.

Q And in that letter, doctor, didn't they tell you they were terminating your number because of the manner in which you were using the drug, because the manner in which you were using it was unsafe and further that the investigation was not being conducted in accordance with the plan as submitted, and that the investigation presented imminent hazard to the public health, primarily due to indirection of the investigation —didn't they tell you that, doctor?

A That is what they told me by letter, that is not what they told me in person. That was a letter they released to the news media also.

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[RECROSS EXAMINATION OF
THOMAS W. MOORE, JR.]

[V-58] Q Didn't Mr. Jacob Stein, as the result of that conference with Mr. Glanzer where you were present and there was a detailed conference where you agreed to iron out certain things with respect to dealing with methadone, isn't that correct?

A Right.

Q Didn't Mr. Stein send you a memorandum as a result of that conference and the agreements that you and Mr. Glanzer had reached and didn't you receive that letter?

A Yes, sir.

Q And didn't you violate every one of those advisements that he put in that memorandum?

A I don't know if I violated them, every single item in that memorandum, I don't remember it word for word.

(Whereupon a document was marked for identification as Government's Exhibit No. 31)

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[INSTRUCTIONS TO THE JURY]

[V-134] THE COURT: (THE HONORABLE GERHARD A. GESELL): Ladies and gentlemen of the Jury: We have reached that stage in the case where it becomes the duty and obligation of the Court to instruct the Members of the Jury as to the law. You are required to follow these instructions in exercising your responsibility, which is to pass on the facts of the case. You may not question any rule of law as the Court states it to you. You are the sole judges of the facts and you must determine the facts from the evidence you have heard from the witness stand, from the exhibits in evidence, from any stipulations of counsel, and the inferences reasonably deducible therefrom.

What the Court proposes to do is to first discuss with the Members of the Jury certain basic, fundamental principles of law that apply in any criminal case tried in this courthouse, and in this courtroom, under the Constitution and Law of this country.

Then the Court proposes to turn to a discussion of the elements of the offenses charged, bringing into focus clearly what the factual issues presented to you are in this case. You have just heard the able arguments of counsel on both sides. What the attorneys say is not evidence. If your recollection differs from the recollection of either of the attorneys, it is your recollection and your recollection alone, which controls.

[V-135] The arguments, or summary arguments, as they are sometimes called, are limited and, if in the heat of advocacy or in the short time they have available, the attorneys failed to mention some aspect of the evidence which came to your attention, you must consider that as well as any evidence which was mentioned by either of the attorneys.

The function of the Court, as I am sure you well know, is to attempt to conduct an orderly and efficient trial, to rule on matters of evidence or procedural questions that might arise in the course of the case, either up here at the Bench or when we were discussing some kind of legal problem or ruling on something in open court. Occasionally, the Court in this trial and in every

trial, as asked questions of some witness or other, or has asked something of Counsel. You are not in any way to draw any inference of any kind as to how the facts should be decided in this case from anything that the Court has done or said in the course of this trial. There is nothing that I am going to do or say in the course of these instructions which is intended to convey to you how the Court feels the facts in this case should be determined because I again say and emphasize to you that you are the sole judges of the facts.

It is my obligation to present to you the underlying legal considerations which should guide you in your determination of the facts.

[V-136] I have emphasized the necessity of your deciding this case upon what has occurred here in the trial. You must decide the case solely on evidence presented and you must completely disregard any press, television or radio reports which you might have read, seen or heard.

Every defendant in a criminal trial is presumed to be innocent, and this presumption of innocense attaches to a defendant throughout the trial. The burden is on the Government to prove the defendant guilty beyond a reasonable doubt. If the government fails to sustain this burden then you must find the defendant not guilty.

The Defendant is not required to prove his innocense under our system of jurisprudence.

Now, counsel have used the term "reasonable doubt" and the Court will use the term "reasonable doubt" on a number of occasions and it is important that you understand what is meant in law by this term. It is a doubt based on reason. It doesn't mean any doubt whatsoever; it is not a fanciful doubt or a whimsical doubt, or a doubt based wholly on conjecture. Proof beyond a reasonable doubt as proof to a moral certainty, but not necessarily proof to a mathematical or scientific certainty.

A reasonable doubt is one which is reasonable in view of all the evidence. A Defendant is never to be convicted on mere suspicion or conjecture, or the mere [V-137] possibility of guilt. A reasonable doubt may arise not only from the evidence produced, but also from the nature of the evidence or the lack of evidence. Perhaps

this will assist you to better understand what the Court has in mind: If, after impartial comparison and consideration of all of the evidence, you have such a doubt as would cause you to hesitate to act in matters of importance to yourself, then you have a reasonable doubt, but, if after such impartial comparison and consideration of all of the evidence, and giving due consideration to the presumption of innocense which attaches to the Defendant, you can truthfully say that you have an abiding conviction of the Defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your own personal affairs, then you do not have a reasonable doubt.

Now, as the sole judges of the facts, you are the sole judges of the credibility of witnesses. You must, of course, as I am sure you understand, weigh the testimony of all of the witnesses who have appeared before you and all the facts and circumstances concerning which testimony has been introduced.

As the sole judges of the facts, you are the sole judges of the credibility of the witnesses. In other words you and you alone are to determine whether to believe any witness [V-138] and the extent to which any witness should be credited. In case there is any conflict in the testimony, it is your function to resolve that conflict and to determine where the truth lies.

As you know, the Defendant is permitted to become a witness in his own behalf. His testimony should not be disbelieved because he is the Defendant. In weighing the testimony, you should appraise his testimony by the same standards as to credibility which the Court has now indicated to you are applicable to any other witness and, in the end, you should give his testimony such weight as in your judgment you feel it is fairly entitled to receive.

Now, in reaching a conclusion as to the credibility of any witness, including the Defendant, and in weighing the testimony of any witness, you may consider any matter that you feel has a bearing on the subject. You ought to use your every-day common sense. For example—you may consider the demeanor and the behavior of the wit-

ness on the witness stand, the witness's manner of testifying whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, whether the witness had a full opportunity to observe the matters concerning which he testified, and whether the witness has any interest, vital or otherwise, in the outcome of the case.

[V-139] You may consider the reasonableness or the unreasonableness, the probability or the improbability, of the testimony of a witness in determining whether to accept it as true and accurate, and you may consider whether the witness has been contradicted or corroborated by other evidence which you find credible and, in the end, you should give such weight to the testimony of each witness as, in your judgment, you feel it entitled to receive.

We have had a number of witnesses in this case who have qualified and testified as experts. An expert in a particular field is permitted to give his opinion in evidence. You are not bound by that opinion of the expert. You should consider his testimony in connection with the other evidence in the case and give it such weight as, in your judgment, you feel it is fairly entitled to receive.

In this connection, you should consider among other things the experience, training, and credibility of the expert witness, the extent to which he has had exposure and contact with the field concerning which he has given an opinion and with the problems with respect to which he has given an opinion.

I do want to say in passing that the Court requires the parties to indicate in advance of the case any possible witness that may be called. In this instance I believe both sides indicated that they may be calling certain experts who did not appear since Counsel found it inappropriate or [V-140] unnecessary as the case went forward. You should not draw any inference for or against either side in this controversy because a particular witness was or was not called.

There are in this case, as in many types of cases, two types of evidence from which you may find the truth as to the facts—they are what we call direct evidence and

what we call circumstantial evidence. Direct evidence is the testimony of someone who asserts actual knowledge of a fact, such as an eye-witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocense of a Defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence—nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should consider all of the evidence in the case, both direct evidence and circumstantial evidence.

Now I am going to turn to a discussion of the offense charged in this indictment. You will have a copy of the indictment with you in the jury room. I want to be sure you understand, and I want to emphasize, that the indictment raises no inference of guilt—the indictment is not evidence. The indictment is merely the method by which a defendant is brought to trial and apprised of the charges against him.

As I will indicate, and as I state to you now and as you will observe, there are thirty eight counts in this [V-141] indictment, each of them charging the same offense, namely, unlawful distribution and dispensing of controlled substance, a matter which I will discuss more fully with you in a moment, but from the standpoint of evidence, a separate offense is charged in each of these counts in the indictment and each offense and the evidence applicable thereto should be considered by you separately, and the fact that you may find the Defendant guilty or not guilty on one count of the indictment should not necessarily control your verdict with respect to any other count of the indictment.

The Defendant is charged with violation of the Controlled Substances Act which makes it unlawful for a prescribing physician—knowingly or intentionally—to dispense or distribute a controlled substance under certain circumstances.

In order to convict the Defendant you must find that the Government has proved each and every element of the offense beyond a reasonable doubt. Otherwise you must acquit him.

There are three essential elements of the offense charged in this indictment in each of these thirty eight counts and I propose to discuss each of these elements with you. The first essential element is that the Defendant distributed or dispensed a controlled substance.

Now, what is a controlled substance? As a matter [V-142] of law, methadone is a controlled substance. That is established by Statute, and it is undisputed that Dolaphine pills, concerning which you have heard evidence in this case, are a form of methadone and you may so find.

Next, what is meant by to dispense or to distribute? The term "dispense" means to deliver a controlled substance by prescribing a controlled substance to an ultimate user. The ultimate user is a person who has lawfully obtained and possesses a controlled substance for his own use or for the use of a member of his household.

The term distribute means to deliver a controlled substance other than by dispensing it.

Under the law, the mere issuance of a prescription by a doctor which is subsequently filled by a druggist, constitutes dispensing or distributing, whichever the case may be, because the prescription is essential before delivery can be completed by the pharmacist.

Secondly, it must be established that the Defendant acted knowingly and intentionally. The term "knowingly" as used in the offense charged, means that the act was done voluntarily and on purpose and not because of mistake or accident. Knowledge may be proved by the Defendant's conduct and by all the facts and circumstances surrounding the case. No person can avoid knowledge by purposely closing his eyes [V-143] to facts which should prompt him to investigate.

The term "intentionally" means that a person has the purpose to do a thing. It means that he made an act of the will to do the thing. It means that the thing was done consciously and voluntarily and not inadvertently or accidentally.

Of course, intent cannot always be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but you may infer

as to the Defendant's intent from the surrounding circumstances.

You may consider any statement made, act done or omitted by the Defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts which he knowingly does or knowingly omits doing. Of course, in this connection you must, among other things, weigh carefully the credibility of the Defendant and consider his statements as to his intent in the light of all the facts and circumstances as you may find them to be.

Thirdly, you must also find beyond a reasonable doubt that a physician, who knowingly or intentionally, did dispense or distribute by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of [V-144] medical practice generally recognized and accepted in the United States.

I am going to read that to you once again. You must find also beyond a reasonable doubt that a physician who knowingly or intentionally did dispense or distribute by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States.

Now let me explain that to you further: The Law does not permit any physician to prescribe methadone for the purpose of continuing a person's dependence on an addictive drug, including a dependence on methadone. He can prescribe for, and only for, the purpose of detoxification and if, and only if, in good faith he proceeds in accordance with a standard of medical practice generally recognized and accepted in the United States.

Now, how do you determine "standard medical practice"? What is such a standard or standards for the purpose of this case? The standard is not to be determined by any arbitrary concept, but by the opinion of experts who have testified in this case. It is their testimony as to what is or is not a proper standard which counts.

You must not concern yourselves with what you think the standard of medical practice should be, but only with what it is.

[V-145] It is not what you think, nor what a particular doctor thinks should be done for addicts, or what is the best way or not the best way to stop crime. Good faith means an honest effort to prescribe for detoxification in accordance with a standard of medical practice generally recognized and accepted in the United States.

Mistake, of course, is not a breach of good faith. A doctor does not breach good faith by a mere error of judgment or because results are not as favorable as he expected or anticipated.

You need not agree with or believe in the standard practices of the profession, but must only be concerned with a good faith attempt to act according to them. Good faith is not merely a Doctor's sincere intention towards the people who come to see him, but rather it involves his sincerity in attempting to conduct himself in accordance with a standard of medical practice generally recognized and accepted in the United States.

In making these determinations, you should weigh all of the facts and circumstances, and not make a judgment because of any single fact or factor. The Government must establish beyond a reasonable doubt what is the standard or what are the standards of medical practice generally recognized and accepted in the United States for prescribing methadone for the purpose of de-toxification, and that what the [V-146] Defendant did was contrary to a good faith effort to comply with any such standard. If you are unable to find beyond a reasonable doubt on either of these factors, or whether Methadone was dispensed or distributed knowingly or intentionally by the Defendant, you must find the Defendant not guilty.

I do want to say to you, ladies and gentlemen, that this case has nothing whatever to do with whether or not a person may go to a private physician for drug treatment, and I am sure you recognize that.

The material brought to your attention concerning the Grand Jury proceedings on a number of occasions, and communications between the United States Attorney and

Dr. Moore, was brought to your attention for its bearing on Dr. Moore's knowledge and intention of good faith. He is not on trial for breaking any agreement or commitment he may have made to anyone in these Grand Jury proceedings. The proof only concerns his consciousness, if any, of what was considered a desirable standard of practice, and of drug maintenance and what drug maintenance may entail.

There has been a strong appeal made in this case, ladies and gentlemen, on both sides, to your sympathies or to your prejudices. You should bear in mind you are deciding nothing but this case. Your determination of the guilt or innocense of the Defendant must be reached solely on the basis of the evidence adduced at this trial, without [V-147] any feeling or emotion, without any bias or prejudice, without any anger on the one hand and without any sympathy on the other.

Experience teaches that if a Jury permits any feeling of bias or prejudice or any feeling of sympathy to enter into their determination of the verdict, then the Jury is not properly performing its function, and just is not done.

The question of possible punishment of Dr. Moore in the event of conviction is no concern of the Jury and should not enter into or influence your deliberations in any way. The duty of imposing sentence in the event of conviction rests exclusively upon this Court, and the Court has wide latitude in such matters. You should weigh the evidence in the case and determine the guilt or inocense of the Defendant solely on the basis of the evidence, without any consideration whatsoever of the matter of punishment.

You are directed that your verdict must be the considered judgment of each Juror. In order to return a verdict it is necessary for each Juror to agree thereto. Your verdict must be unanimous.

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[990] PROCEEDINGS

THE COURT: Mr. Brown, in Dr. Moore's case, I want first to take his arraignment on the bond-default indictment.

MR. BROWN: May we approach the bench on that, Your Honor?

THE COURT: No, what is on your mind?

MR. ALTO: May we approach the bench? I think it would be appropriate at the bench.

THE COURT: I don't like to do that.

MR. BROWN: I do think it is in order, if Your Honor please.

THE COURT: All right.

(Whereupon, counsel approached the bench and the following proceedings were held.)

MR. BROWN: If Your Honor please, when Mr. Alto advised me of the return of this indictment, I suggested to him what my viewpoints were as to the efficacy of such an indictment. He has given it some consideration and I think he has certain representations to make to the Court.

THE COURT: I am not going to take them up here at the bench. If you want to dismiss this indictment, you can dismiss it.

MR. ALTO: No, if Your Honor please, this is the proposal I tossed out to Mr. Brown.

Mr. Brown did point out something to me that I have [991] had time to think over with reference to the statute related to bond-jumping. With reference to that statute, in order to convict a person under it, it has to be a failure to appear before a court or judicial officer. I am afraid what we are dealing with here is that his next-required appearance was November 13.

THE COURT: I will take a not guilty plea and set it down later on.

MR. ALTO: I offered this to Mr. Brown. The breach of the conditions is clearly a contempt of Court and I

offered that to Mr. Brown. It could be that we could work it on the basis of an oral order to show cause why he shouldn't be held in contempt of this Court.

THE COURT: He is leaving for a Federal penitentiary this afternoon.

MR. ALTO: This all could be done today; and he will admit, as I understand from Mr. Brown, that he is guilty of that; and he could be treated accordingly. The maximum penalty for criminal contempt is, of course, six months.

Would that be acceptable to Your Honor?

THE COURT: That is agreeable to me.

MR. BROWN: That is agreeable to the defense.

MR. ALTO: This would dispose of the entire matter.

THE COURT: I think you ought to say that on the record. We have an audience here and I don't like to have any questions as to what lawyers are discussing with the Judge about [992] sentence. I will put it on the record. I will mention it to him.

MR. BROWN: Very well, sir.

MR. ALTO: All right.

(Whereupon, counsel resumed their places and the following proceedings were held.)

(Whereupon, the Defendant was brought into the courtroom.)

THE COURT: You can come up here, please, sir.

(Whereupon, the Defendant approached the lectern.)

THE COURT: Counsel, Dr. Moore, have just brought to my attention that there may be a technical problem with the indictment which was returned November 9, charging bond default. Before this indictment was returned, I had in mind discussing with you the fact that you were in contempt of the Court's order, which directed you to appear on Tuesday, after your conviction, for the purpose of surrendering your passport and posting additional bond.

The United States has indicated that it is agreeable to the United States if the matter is handled under the

contempt powers of the Court. Mr. Brown has indicated no objection to that procedure, if it is agreeable to you. The Court is quite prepared to deal with this matter under the Court's contempt powers, and that would result, if we went that way, in the indictment being dismissed. I would have power to impose a [993] sentence for contempt, in addition to the sentence that is about to be imposed on the main case, not to exceed six months.

What I want to ask you is simply this: You understood, did you not, that you were required to report on Tuesday?

DEFENDANT MOORE: Yes, I did.

THE COURT: To post bond and surrender your passport?

DEFENDANT MOORE: Yes, I did.

THE COURT: Have you any objection to the matter being handled in this manner?

DEFENDANT MOORE: No, Your Honor, I don't.

THE COURT: Well, I will then find you in contempt and the question of what the penalty shall be, I will consider at the time I talk with both you and Mr. Brown on the other sentence, and you can cover any aspect of that matter, as well, so that I can take both matters into consideration at the same time.

MR. BROWN: That is perfectly satisfactory.

THE COURT: Now, Mr. Brown, is there anything that you wish to say with respect to this matter before sentence is imposed?

MR. BROWN: Yes, if Your Honor please.

We are, of course, aware that the Court has a full and comprehensive probation report in this matter. I would like to add simply a few comments for Your Honor's consideration prior to imposing sentence.

[994] We all appreciate that the charges of which Dr. Moore has been convicted are very serious charges. I think I can state quite candidly, however, that the interpretation to be placed upon Dr. Moore's actions is one of interpretation and is not necessarily representative of truth.

Your Honor will note, from having heard this trial in its entirety, that Dr. Moore's offense was not a furtive

one. It was not committed in secret. There was nothing done on the part of this Defendant which would suggest that responsibility for his conduct was attempting to be dodged. He kept full records on his activities. Indeed, it was those very records which served to insure his conviction, regarding the amounts of methadone dispensed and to whom. There were no fictitious names utilized by Dr. Moore with reference to his patients. All of these matters were kept by him; and it was those matters that were made vailable for trial.

Dr. Moore's approach to the treatment of narcotic addiction, obviously, from his own testimony, involved a saturation to a point of blockade, in which the euphoria formerly obtained was no longer obtained from heroin and an incentive to become completely drug-free. It was apparently established, if Your Honor please, that Dr. Moore's methods were not in accord with acceptable medical standards.

I recall to the Court's attention that approximately two of the Government's witnesses who testified that they had [995] been so saturated with methadone at a later time were able to become completely drug-free. This may mean nothing. It may, in fact, be significant of nothing. I would proffer to the Court, however, that it does at least suggest that Dr. Moore's approach was not completely without merit.

Quite understandably, Your Honor's appraisal of the issues presented in this case, as to whether or not there are substantial questions of law involved, would have a serious effect on the sentence this Court sees fit to impose. That is, of course, a matter into which we cannot delve at this point. I rely then solely upon the matters which have been presented to the Court and ask that Your Honor be as lenient as possible under the circumstances.

THE COURT: Dr. Moore, is there anything you wish to say to the Court before sentence is imposed?

DEFENDANT MOORE: I have quite a bit to say, but to bring it down, to make it reasonable, without wishing to belabor the Court any, if I seem to be redundant in certain testimony I brought out during trial by myself, I felt that the approach that I did adopt to the

treatment of heroin addiction was a reasonable one, was a necessary one, was, in fact, really needed. The existing methods in this area, not only of medicine but of this area of the country left quite a bit lacking in the competent treatment of drug addiction. This was a method that was not arrived at just by chance, that came about after almost three and [996] a half years work, of constantly changing, changing again, attempting to refine the method, reading, a great deal of research and reading was undertaken on my part, to bring this method into focus. Different programs, different other methods were borrowed from, in order to try to make this a method that could be used by a physician for his patients to be treated on an ambulatory basis, that is, an out-patient basis, as opposed to putting a patient into a hospital and treating him.

I feel that this was accomplished, even if we go so far as to take the witnesses for the Government, each and every one of them did admit, though they did admit other things, had a lot else to say,—how much weight really would be put on the testimony, this is to be argued —but one fact, one common thread ran through all of their testimony, that is, the testimony of the various witnesses that were addicted to heroin: Number one, first, they came to me asking for help; number two, each and every single one of them was addicted to heroin when I started treatment. This was borne out by my physical examination and/or laboratory tests. During the period that they were associated with my office at 1518 9th Street, Northwest, all of these patients admitted under oath that they had no further, no use, or had no desire to use heroin, and thereby find themselves back in the position of having to perform various—the various activities, criminal acts, dehumanizing acts, in order to raise large sums of money in order to continue a heroin habit.

[997] All of these witnesses admitted that our association led them away from heroin and into methadone. This was the prime thrust of my work on 9th Street. I felt and I still feel that such a thrust is necessary if any advances are to be made in this particular field.

Anything that I would say would be redundant. I think it was in my testmiony at trial. I did testify for a whole day, attempting not to put my theories out but theories of other physicians who have worked in this field, both in this country and out of this country. These theories, I feel to be valid, since we are dealing with the same drug, that is, heroin, and being that as it is, that is, the nature of the drug, the nature of the disease that we were fighting, and I feel that during the time that I was allowed to function—in fact, I know this, this has gone past belief with me now, this is just a knowledge that I have now—that those patients that did do exactly as they were directed did benefit greatly.

I have no problem further with the idea of those cases presented here by the prosecution. As mentioned for the record, I have treated, I think, over three and a half, almost four years, between 25 and 40 thousand patients in my office. I think the original indictment read 639 counts. It was eventually reduced to, I think, between 30 and 40. I don't remember the exact number. These were the cases that were presented here in the courtroom.

[998] To me, as the treating physician, in each of these cases, I considered these to be my problem cases. Those were patients that needed extra attention, extra case, extra attentiveness on my part; and this they did receive.

The gross majority of my patients could be handled. It was to me, since I was the treating physician, that is, I, who had to come to a medical decision, an ethical medical decision, one that I thought was ethical, and purely medical in context, to help all of the patients that I did treat for this particular disease; and this, I can honestly say, was undertaken by me during the time that I was allowed to treat these persons who, unfortunately, had become afflicted with this disease, that is, heroin addiction.

THE COURT: Is there anything that either of you wish to say concerning the contempt matter? Mr. Brown, you didn't cover that. Is there anything you wish to say?

MR. BROWN: I am sorry. Yes, if Your Honor please.

There, of course, can be no denial, as we have indicated to the Court, that Dr. Moore is in contempt of Court for failure to satisfy the conditions set by this Court in surrendering his passport and setting his $25,000 bond.

I think it is unfortunate, and not necessarily so from the standpoint of our own personal interest, but in terms of representing Dr. Moore, that I, myself, have never been threatened [999] with the utter, complete destruction that this man obviously faces. As Your Honor knows in the background information given to you, Dr. Moore has had no prior brushes with the law other than the one previously involving his practice and this matter for which he stands convicted. But he has no criminal background. He has come from a good family. He has worked hard to get through school. And to this point, he has done well with his practice.

To suddenly find himself, if Your Honor please, faced with the enigma of almost certain destruction, to find himself suddenly faced with representations given, albeit in good faith by the Prosecutor, that a number of other investigations are being conducted with reference to seeking to further convict this man of other offenses, I think it lends itself to a state of mind of utter panic, if Your Honor please, utter panic which perhaps is not justified, which is, nevertheless, understandable.

This man, in fleeing, as he did, fled not just to avoid consequences he thought he might face, but fled for his inner survival. Once he found himself, if Your Honor please, in an atmosphere where the overt pressure was not as imminently present upon him, where there were open to him the options of either resigning himself to whatever this Court and other law-enforcement officials sought to do, as against running off still yet to another environment where nothing could happen, it became easier for him to make a decision within himself as to what it [1000] was Dr. Moore wanted to do.

It was for those reasons, if Your Honor please, that I believe Dr. Moore left; and it was for the latter reasons that he returned. Because he made up his mind as to what he wanted to do.

I think the fact that he did return says a lot about the man, himself. It presupposes his commitment to accept the sentence of this Court, and to accept the processes of law-enforcement agencies as they expect to bring upon him.

I can only say to the Court that Dr. Moore was a man afraid, so frightened by a bulwark of investigation of which he had never before encountered that he simply lost control. But he has now regained that control and he is here before this Court voluntarily.

I would like to state also for the record, if Your Honor please, there was considerable representation immediately upon Dr. Moore's return that he had been rejected by the Danish Government; and that was not true. We defy any Government official or agency to present to this Court any affidavit or request for permanent residency presented to the Danish Government. That simply was not done. No application for residency was ever made. Dr. Moore was not deported. His passport was not lifted. He was not listed as a deportee. And he had at the time of catching his plane to the United States the option available to him of going to at least five other countries, [1001] visas for which were contained in his passport at that time. His return to this Court was voluntarily on the basis of his own soul-searching.

Beyond that, I think we can offer nothing more.

THE COURT: Anything you want to say about that aspect of it, Dr. Moore?

DEFENDANT MOORE: No, Your Honor, I think he covered it in bulk pretty well.

THE COURT: The Court has, as you know, Mr. Brown, not followed the practice of commenting on information given at allocution. I do feel, however, required simply to state that I do not view this case as a medical case. I view this case as a case involving a major narcotic drug pusher who deliberately violated the law for profit. I impose a sentence accordingly.

On Counts 3, 5, 7, 8, 9, 13, 14, 27, 29, 30, 31, 32, 35 and 37, I impose a sentence of five-to-fifteen years.

On the counts involving juveniles, 16, 17, 18, 20, 21, 23, 24 and 25, I impose a sentence of ten-to-thirty years. The sentences on the juveniles of ten-to-thirty years are to be consecutive to the sentences imposed for the adults, making a jail sentence of fifteen-to-forty-five years.

I impose on each of the adult counts, in addition, a committed fine of $5,000, for a total of $70,000; and on each of the juvenile counts, a fine of $10,000, for a total of $80,000, making the total fine $150,000.

[1002] In addition, I impose a special parole term of twelve years for each count, to run concurrently on all counts, imposing it pursuant to 21 U.S. Code 841(c).

In addition, the Defendant's license to practice medicine in the District of Columbia is revoked, pursuant to 2 D.C. Code 131.

I direct that Dr. Moore be taken forthwith to a Federal penitentiary.

That is the sentence of the Court.

MR. ALTO: If Your Honor please, is sentence going to be imposed—

THE COURT: I can impose a sentence now for contempt, of three months, consecutive to the sentence imposed.

MR. ALTO: May all remaining charges be dismissed, if Your Honor please.

THE COURT: Yes.

You have a right to appeal, Dr. Moore. You will have to file your appeal within ten days. Mr. Brown will advise you with respect to those aspects of the matter.

(Whereupon, the proceedings were concluded.)

• • • •

[GOVERNMENT EXHIBIT 31]

STEIN AND MITCHELL
ATTORNEYS AT LAW

1200 Eighteenth Street, N.W.
Washington, D.C. 20036

October 26, 1970

Seymour Glanzer
Chief, Fraud Unit
Room 3136-C
United States Court House Building
3rd and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Thomas W. Moore, Jr., M. D.*

Dear Mr. Glanzer:

I certainly do appreciate your help in the above matter and you and your staff have given considerable time to the problem in which we are all attempting to fashion a resolution which would not deprice Dr. Moore of an opportunity to serve the community within the framework of the law.

Inasmuch as there was no transcript of our meeting I made a memorandum of it in the form of the enclosed letter which was sent to Dr. Moore.

Again, let me thank you for your consideration.

Sincerely yours,

/s/ Jacob A. Stein
JACOB A. STEIN

JAS/ap
Enclosure

October 23, 1970

Thomas W. Moore, Jr., M. D.
278 M Street, S. W.
Washington, D. C.

Dear Mr. Moore:

I wish to state again in writing that you should not discuss your appearance before the Grand Jury or your talks with Mr. Glanzer in any way. The matter is still in suspense and comments by you could affect the outcome. I hope you will rely on my judgment in this and repress any desire that you have to make public statements concerning the subjects which were discussed with Mr. Glanzer in his office and before the Grand Jury.

I would also like to give you my understanding of what the governmental regulatory agencies require based upon the discussions with Mr. Glanzer and the material which I have collected. These requirements are as follows:

1. A medical history must be obtained which includes the history of the addiction and the type of drug or drugs which the victim uses.
2. A reasonable thorough physical examination of the patient.
3. The names of other physicians who have treated or are treating the patient should be obtained and lines of communication established so that there will be no duplication of prescriptions.
4. A urinalysis should be used to determine if the victim is an addict and drugs are being used contemporaneously with the methadone treatment.
5. The time and amount of the last dosage should be recorded.
6. The physician should give attention to other medical problems of the patient such as liver disorders, etc.
7. The physician should determine if there are any psychiatric disorders which need treatment and if psychotherapy is necessary.

8. The physician should evaluate needle marks to determine the age of the needle marks and the manner in which drugs are taken.
9. The patient should be advised that methadone is an addictive drug and as an addictive drug is dangerous and cannot be used unless used carefully.
10. The correct name of the patient should be verified and identification should be secured. This should be done because the physician is dealing with a dangerous drug.
11. The physician should not treat minors under twenty-one years of age without the consent of parents if that consent can be reasonably obtained.
12. Since there are dangers with respect to self administration the physician should not give large quantities of drugs. Unless the drug is being taken in the presence of the physician or his nurse a prescription should be so small that it represents only a daily dosage. This is to prevent a diversion of the drug. There is danger with respect to dosage larger than a daily dose because it may be shot up immediately or may be diverted.
13. The physician must have in mind that in dealing with methadone he is dealing with a drug which has been classified under the Harrison Act and he is subject to the provisions of that Act which requires him to take the steps listed above to prevent diversion or unsupervised usage. There is some evidence that one who attempts to withdraw from methadone addiction will find it as difficult or more difficult as withdrawal from heroin.
14. Methadone programs do serve a valuable function, however, they must be conducted within the framework given above.

It is also my understanding that you will strictly comply with Medicaid and Medicare provisions when and if you are reinstated.

I have set all this out, Dr. Moore, so you will understand what I drew from the several conference with Mr. Glanzer. All who have been concerned with this case including the representatives of the U. S. Attorney's Office feel that you have a great deal to offer the community, how-

ever, the service can only be rendered in a fruitful way if it is done well within the confines of the law.

I hope that the matter will terminate without an indictment and that you can perform the service which all of us feel you are capable of.

Sincerely yours,

/s/ Jacob A. Stein
JACOB A. STEIN

JAS/ap

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1350-72

UNITED STATES OF AMERICA

v.

THOMAS W. MOORE, JR.

On this 13th day of November, 1972, came the attorney for the government and the defendant appeared in person and by counsel, Edwin Brown and Henry Lincoln Johnson.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of UNLAWFUL DISTRIBUTION AND DISPENSATION OF CONTROLLED SUBSTANCE as charged in Counts 3, 5, 7, 8, 9, 13, 14, 16, 17, 18, 20, 21, 23, 24, 25, 27, 29, 30, 31, 32, 35, and 37 of the retyped indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS to FIFTEEN (15) YEARS on counts 3, 5, 7, 8, 9, 13, 14, 27, 29, 30, 31, 32, 35, and 37 and TEN (10) YEARS to THIRTY (30) YEARS on counts 16, 17, 18, 20, 21, 23, 24, and 25; said sentences to run consecutive. Total sentence of FIFTEEN (15) YEARS to FORTY-FIVE (45) YEARS.

In addition there is a fine imposed on each of counts 3, 5, 7, 8, 9, 13, 14, 27, 29, 30, 31, 32, 35, and 37 of FIVE THOUSAND ($5,000.00) DOLLARS for a total of SEVENTY THOUSAND ($70,000.00) DOLLARS and on each of counts 16, 17, 18, 20, 21, 23, 24, and 25 there is imposed a fine in the amount of TEN THOUSAND ($10,000.00) DOLLARS for a total of EIGHTY THOUSAND ($80,000.00) DOLLARS for a grand total of ONE HUNDRED FIFTY THOUSAND ($150,000.00) DOLLARS.

A specal parole term of TWELVE (12) YEARS for each count to run concurrently on all counts is imposed pursuant to Title 21 United States Code 841(c).

IT IS FURTHER DIRECTED that the defendant's license to practice medicine in the District of Columbia is revoked pursuant to Title 2, DCC 131.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THE REMAINING COUNTS ARE HEREBY DISMISSED.

/s/ Gerhard A. Gesell
United States District Judge

IT IS FURTHER DIRECTED that the defendant be taken forthwith to a Federal Penitentiary.

True certified copies of above Judgment and Commitment delivered to U. S. Marshal for the District of Columbia this 13 day of _____.

JAMES F. DAVEY
Clerk

By _____
Deputy Clerk

A TRUE COPY, Certified this 13th day of November, 1972.

JAMES F. DAVEY
Clerk

By /s/ Iva M. Hess
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 74-759

UNITED STATES, PETITIONER

v.

THOMAS W. MOORE, JR.

ORDER ALLOWING CERTIORARI—Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 572212 139

Supreme Court, U. S.
FILED
JAN 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-759

UNITED STATES OF AMERICA, *Petitioner,*

v.

DR. THOMAS W. MOORE, JR., *Respondent.*

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 1975

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute and Regulation Involved	2
Statement	2
Reasons for Denying the Writ	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bell v. United States, 349 U.S. 81 (1955)	11
Bulova Watch Co. v. United States, 365 U.S. 753 (1961)	11
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957)	11
Ginsburg & Sons v. Popkin, 285 U.S. 204 (1932)	11
Jordan v. United States District Court, 233 F.2d 362 (D.C. Cir. 1956)	3
Singer v. United States, 323 U.S. 338 (1945)	10
United States v. Badia, 490 F.2d 296 (1st Cir. 1973)	12
United States v. Bartee, 479 F.2d 484 (10th Cir. 1973)	12
United States v. Collier, 478 F.2d 268 (5th Cir. 1973)	12
United States v. Eaton, 144 U.S. 677 (1892)	10
United States v. Grimaud, 220 U.S. 506 (1911)	10
United States v. Jobe, 408 F.2d 268 (10th Cir. 1973)	12
United States v. Leigh, 487 F.2d 206 (5th Cir. 1973)	12
United States v. Romero, 249 F.2d 371 (2d Cir. 1957)	3
Viereck v. United States, 318 U.S. 236 (1943)	10

Page

STATUTES AND RULES:

Code of Federal Regulations, Title 21

§ 130.44 4
§ 306.01 10
§ 306.04 ..... 4, 9, 10

Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

§ 821 9
§ 822 ..... 2, 7, 8, 11
§ 822(a) 9
§ 822(b) 8, 9
§ 822(f) 9
§ 823 13
§ 823(f) 9
§ 824 ..... 7, 13
§ 829 ..... 10, 11
§ 841 ..... 2, 4, 7, 8, 9, 10, 11, 13
§ 841(a) 9
§ 841(a)(1) 2, 6, 7, 11, 12
§ 842 ..... 7, 9, 11
§ 843 ..... 7, 9

District of Columbia Code, § 2-131 3
Narcotic Addict Treatment Act of 1974, P.L. 93-281, 93rd Cong., 2nd Sess. 13, 16

MISCELLANEOUS:

H. Rep. No. 91-1444, 91st Cong., 2nd Sess. (1970) 8
H. Rep. No. 93-884, 93rd Cong., 2nd Sess. (1974) 13
U.S. Code, Congressional and Administrative News (1970) 8
U.S. Code, Congressional and Administrative News (1974), Adv. No. 5 14

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-759

UNITED STATES OF AMERICA, *Petitioner,*

v.

DR. THOMAS W. MOORE, JR., *Respondent.*

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Now comes the Respondent and files this Memorandum in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. It appears as Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Respondent believes that the question presented by the Petition is more properly stated as follows:

> Whether a duly licensed physician, registered under Section 822 of the Controlled Substances Act, 21 U.S.C. § 822, with the Bureau of Narcotics and Dangerous Drugs (BNDD) as a person authorized to prescribe methadone, is subject to prosecution under Section 841(a)(1) of the Act, 21 U.S.C. § 841(a)(1), for having "distribute[d], or dispense[d], a controlled substance".

The United States Court of Appeals for the District of Columbia Circuit, finding Section 841(a)(1) inapplicable to one who had been authorized pursuant to Section 822 to prescribe controlled substances, reversed Respondent's conviction. Respondent submits that the Court of Appeals correctly discerned the question presented and answered it properly.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Controlled Substances Act, 21 U.S.C. Section 801, *et seq.*, and of Title 21, Code of Federal Regulations, are set forth in Appendix C to the Petition.

STATEMENT

The Respondent, Dr. Thomas W. Moore, Jr., was convicted on twenty-two counts of violating 21 U.S.C. § 841. The original indictment against him had contained 639 counts. At the suggestion of the trial court,

a "manageable" group of counts, 40 in number, were selected for trial and the indictment was retyped accordingly. He was convicted on 22 of the 40 counts. On 14 of those counts, the trial court imposed concurrent 5-15 year sentences. On the other eight counts, said to relate to dispensing methadone to minors, the court imposed concurrent sentences of ten to thirty years, the latter sentences to be consecutive to those imposed on the other 14 counts. The total sentence imposed, therefore, was fifteen to forty-five years.[1] In addition, fines totalling $150,000 were imposed. And, at the time of sentence, all remaining counts were dismissed.

Each of the twenty-two counts of which Dr. Moore was convicted charged him, as to a specified person and time, with having "knowingly and unlawfully distributed and dispensed . . . a Schedule II narcotic drug controlled substance", to wit, a certain quantity of methadone.

---

[1] Moreover, the court (a) imposed a "special parole" term of twelve years on each of the twenty-two counts, to run concurrently; and (b) revoked Dr. Moore's license to practice medicine in the District of Columbia pursuant to D.C. Code § 2-131. The statute authorizing revocation, D.C. Code § 2-131, provides an automatic stay pending appeal. The reversal of Dr. Moore's conviction automatically vacated the revocation.

The multiple sentences for counts said to involve minors were improperly imposed. The indictment did not allege the minority status of the patients, *United States* v. *Romero*, 249 F.2d 371 (2d Cir. 1957), nor did the jury make any special finding thereon. *Jordan* v. *United States District Court*, 233 F.2d 362 (D.C. Cir. 1956). In view of its disposition on the merits, the majority opinion in the court below did not reach this point; even the dissenting judge, however, agreed that the sentences were improperly aggregated. Petition, App. A, 48a, and fn. 15. In the event resentencing becomes necessary, Respondent will urge that the same considerations which invalidate the doubled sentence equally invalidate the consecutive nature thereof.

It was clear from the evidence that this was not a case of surreptitious drug-peddling, but rather one of a licensed physician, registered with the Attorney General under the appropriate statute as a person authorized to prescribe methadone, openly prescribing methadone to his patients. It was the prosecution theory, shared by the trial court, that the doctor could lawfully prescribe methadone only for detoxification and that 21 U.S.C. § 841 made it a crime for him to prescribe it either (1) avowedly to maintain methadone addiction in a patient who would otherwise be taking heroin,[2] or (2) purportedly to detoxify a patient, but by a method found by the jury to be not "in good faith . . . in accordance with a standard of medical practice generally recognized and accepted in the United States." Tr., October 20, 1972, 144 (see Petition, App. A, 5a 6a).

The facts which, Respondent concedes, the jury could have found beyond a reasonable doubt are that Dr. Moore, with respect to patients named in the indictment as well as others during the indictment period, including Government agents posing as patients, conducted himself more or less as follows:

1. He did not take all possible precaution to assure himself that the patients for whom he was prescribing methadone were in fact narcotic addicts. In some instances they were not.

[2] As to this, both the prosecutor and the trial court were clearly in error. Methadone maintenance was not proscribed by the statute or by any regulations then in effect. 21 C.F.R. § 306.04, the regulation relied upon by the government at trial (Petition, App. A, 5a) did not so proscribe. 21 C.F.R. § 130.44 did mandate certain pre-maintenance requirements which, we may assume, the Respondent did not meet—but, Section 130.44 did not become effective until after the events charged in the indictment.

2. He did not take all possible precaution to ascertain that the methadone he was prescribing was in fact being consumed by the patients for whom he prescribed it. In some instances they delivered their methadone to someone else.

3. His record-keeping was inadequate, in some instances, to record the quantity of methadone prescribed for a patient.

4. He prescribed methadone in quantities larger than the prosecution's expert witnesses thought proper for detoxification.

5. The fees he charged were graduated not in accord with the medical services rendered but rather in accord with the quantity of methadone prescribed. Petition, App. A, 4a.

Dr. Moore's testimony, which the jury was free to disbelieve, was that his purpose in prescribing methadone for his patients was to cure them of drug addiction. His theory, the inspiration for which he attributed chiefly to the experience of a British practitioner he claimed to have read about in the medical literature, was that cure depended upon methadone in such large quantities, varying from case to case, as might be required to achieve in the patient two conditions: (1) a physical condition of "blockade";[3] and (2) a psychological condition of strong desire for drug detoxification. According to that theory, if only enough methadone to achieve the first condition were taken, the subsequent "detoxification" by gradual diminu-

[3] "Blockade", according to an expert called by the defense, "means that you stuff a patient up with enough methadone so that the heroin he takes doesn't have any place to go but straight in and out . . . . I mean, whatever heroin did for the brain, it no longer does it at a certain X-level of methadone." Tr., October 18, 1972, 554-55.

tions of dosage would produce only temporary remission of the addiction. To achieve cure, however, the methadone dosage must be continued beyond "blockade", until the second condition has been achieved—in which the counter-craving for detoxification substitutes for the drug-craving. It was upon this theory that Dr. Moore justified his practice of allowing his patients' desires to determine the quantity of methadone he prescribed for them.[4]

REASONS FOR DENYING THE WRIT

In urging this Court to grant the writ, the government asserts that the case presents a question of statutory construction which is of substantial importance in enforcing the narcotics laws. The government goes on to assert that, if the decision of the court below stands, it will have immunized physicians from prosecution under Section 841(a)(1) of the Act and "will permit them to distribute narcotic drugs for clearly illegitimate purposes solely upon the basis of their statutory authorization to dispense narcotic drugs within the course of their legitimate professional practice." Petition, 9. Moreover, the government asserts the result reached by the Court of Appeals is at odds with that reached by other courts of appeals. Respondent will respond to these assertions in turn. In short, it is the Respondent's position (1) that the Court of Appeals was correct in its analysis of the statutory and regulatory scheme here at issue; (2) that any intra-circuit conflict is more illusory than real, the conflict

[4] As for his fee schedule, Dr. Moore's explanation was that his purpose in charging more for prescriptions of higher quantities was to make it uneconomical for his patients to peddle their methadone in the black market and, thus, to insure they consumed it themselves.

being in result rather than of analysis, none of the other circuits having undertaken the extensive statutory and regulatory analysis made by the court below: and (3) recent statutory and regulatory changes have, at one and the same time, (a) reinforced the conclusion reached by the court below and (b) made deregistration of errant physicians, and subsequent prosecution thereof, easier to accomplish.

1. The conclusion of the court below is correct and the court's reasoning clearly supports that conclusion. The court, in substance, held Section 841(a)(1) of the Act to be inapplicable to a licensed physician registered under Section 822 of the Act to prescribe methadont. Petition, App. A, 7a-10a. The court held further that the statutory scheme established by the Controlled Substances Act divided the universe of those controlled into two groups, those registered with BNDD and those not so registered. With respect to those registered, as long as the registration remained in force, their criminal liability was found in Sections 842 and 843 of the Act (not Section 841), with appropriate administrative sanctions up to and including revocation being found in Section 824 of the Act. With respect to those not so registered, the "pusher", the full panoply of severe criminal penalties were reserved. In short, a broad outline of the congressional intent showed a statute which dealt with registrants primarily through a system of administrative controls, relying on rather modest penalty provisions to enforce those controls, with the sanction of revocation for more serious violations. The severe penalties of Section 841 were reserved for those who sought to avoid regulation entirely by not registering. Petition, App. A, 1a, 8a-10a. The court correctly ascertained the congressional intent.

The statute under which Dr. Moore was indicted and convicted, 21 U.S.C. § 841, makes it a crime for a person to dispense methadone "except as authorized by this subchapter . . . ." Under § 822(b),

> "[P]ersons registered by the Attorney General under this subchapter to . . . dispense controlled substances are authorized to . . . dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

Dr. Moore, at all times, was duly registered with BNDD pursuant to Section 822 of the Act.

It follows therefore that Dr. Moore was exempt from prosecution *under § 841,* regardless of what the evidence showed him to have done. The statutory language impelling this conclusion is not a mere fortuity. That conclusion is impelled by the legislative history of the statute and by the whole statutory scheme.

The House Committee on Interstate and Foreign Commerce, in reporting out the bill which became the Controlled Substances Act, commenced its analysis of the legislation by pointing out the divergence of treatment of those authorized to deal in narcotics and those not so authorized:

> "The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." House Report No. 91-1444, 91st Cong., 2d Sess., Sept. 10, 1970, U.S. Code, Congressional and Administrative News (1970), p. 4569.

Thus, with regard to registrants, the intent of Congress was to subject them to *administrative regulation and control.* The penal sanctions applicable to misconduct by these "authorized" persons within the system of administrative regulation and control were specified in 21 U.S.C. §§ 842 and 843. The use of Section 841's more severe penal sanctions was reserved for *unauthorized* persons—those dealing in narcotics "outside the legitimate distribution chain . . .".

To effectuate its intent in respect of persons in the "legitimate distribution chain", Congress provided that they must register annually with the Department of Justice (Section 822(a)), and that, having so registered, they were "authorized" to deal with narcotics to the extent of their registration (Section 822(b)). To effectuate the system of administrative controls over registered doctors Congress authorized the Attorney General to conduct inspections of their offices. 21 U.S.C. § 822(f). The registrant, whose registration was granted in the first instance on a finding that he possessed a medical license authorizing him to dispense narcotic drugs (see 21 U.S.C. § 823(f)), thus operated under the vigilant eye to BNDD. The registrant is forewarned that any significant misconduct may trigger a revocation of his BNDD registration and license to practice medicine.

The basic theory of the prosecution was that, although Dr. Moore may have been an "authorized" person within the meaning of Section 841, "by his violation of these regulations [21 C.F.R. § 306.04] he violated 841(a) of the CSA." Petition, App. A, 5a-6a.

The threshold impediment to this theory is that although Congress, in 21 U.S.C. § 821, conferred upon

the Attorney General the power to promulgate regulations, it did not make violations of those regulations a crime. To the extent, therefore, that the conviction rested on violation of 21 C.F.R. § 306.04, it could not be sustained because, whatever administrative consequences may flow from such violations, no pronouncement of law had been violated to which Congress has attached any criminal penalty *United States* v. *Eaton,* 144 U.S. 677 (1892); compare *United States* v. *Grimaud,* 220 U.S. 506 (1911); and see the dissenting opinion of Mr. Justice Frankfurter in *Singer* v. *United States,* 323 U.S. 338, 350-351 (1945). As this Court said in *Viereck* v. *United States,* 318 U.S. 236, 241 (1943):

> "One may be subjected to punishment for crime in the federal courts only for commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

No such punishment was so authorized.

Equally as significant, Section 306.04 was included within Part 306 of the Regulations, the scope of which was stated in Section 306.01:

> "Rules governing the issuance, filling and filing of prescriptions pursuant to . . . (21 U.S.C. 829) are set forth generally in that section and specifically by the sections of this part."

Section 306.04, therefore, whatever its provisions may mean, is no more than a specification of the general provisions of Section 829 of the statute. The penalty for a violation of Section 829 of the Act is specified in Section 842, *not Section 841,* and it ranges between a mere civil money penalty and a maximum criminal

penalty of one year imprisonment plus a fine. Clearly, the violation of a regulation issued pursuant to Section 829 of the Act can arise to no higher dignity than a violation of that statutory provision itself. There is not even a statutory ambiguity suggesting that the prosecutor is free, by electing to prosecute the violation under Section 841, to multiply the maximum penalty for a violation of Section 829 by a factor of fifteen or thirty, as was done here. Moreover, even if there were some ambiguity as to which of the two penal sections —Section 841 or Section 842—applied to a violation of Section 829, ambiguity would have to be resolved in favor of Section 842, because (1) it is the more specific statutory provision, *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961), *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-29 (1957), *Ginsburg & Sons* v. *Popkin,* 285 U.S. 204 (1932); and (2) it provides the lesser penalty. *Bell* v. *United States,* 349 U.S. 81, 83 (1955). The court below correctly so concluded. Petition, App. A, 2a. And it was eminently correct in its conclusion that Dr. Moore, being a registrant within the meaning of Section 822, was not subject to the felony provisions of Section 841 for acts done within and during the course of his registration.

2. The Petition asserts that the "result reached by the court of appeals conflicts with the decisions of the other courts of appeals that have considered the issues . . .". Petition, 14. While it is true that other courts of appeals have sustained the convictions of physician-registrants for violating Section 841(a)(1), the opinion of the court below is the first to have examined in detail the interplay of the registration provisions of Section 822 and the criminal penalties

imposed by Section 841(a)(1). Thus, for example, among the cases referred to by the government as being at odds with that of the court below is *United States* v. *Bartee,* 479 F.2d 484 (10th Cir. 1973). In *Bartee,* however, the court's conclusion rested upon an agreement between the parties which, in effect, removed Section 822 from the court's consideration, and a concession by counsel for the defendant that, in effect, foreclosed the issue. *Id.,* at 488. One of the other cases said to be in conflict, *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973), relies solely upon *Bartee,* 487 F.2d at 208, as does *United States* v. *Jobe,* 408 F.2d 268 (10th Cir. 1973). In yet another case, *United States* v. *Collier,* 478 F.2d 268 (5th Cir. 1973), the statutory analysis was not considered, presumably because the defendant asserted only the vagueness of Section 841(a)(1) as applied to registered physicians, argued that the Tenth Amendment removed from the federal government the power to control medical practice, asserted that Section 841(a)(1) violated the constitutional presumption of innocence and that it created cruel and unusual punishment for physicians. Only in *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973), did the court come to grips precisely with the interplay of Section 822's registration provisions and the felony provisions of Section 841(a)(1) and the analysis in *Badia* is cursory at best.

Thus, while it may be accurate to say that the conclusions of the *Badia, Bartee, Collier, Jobe* and *Leigh* courts are at odds with that reached by the court below, the court in the instant case "respond[ed] to a line of reasoning which was not explored in any of these cases". Petition, App. A, 18a, fn. 51. In view of the fact that, for the first time, a complete statutory and

regulatory analysis has been judicially undertaken, this Court may consider plenary review to be premature. To the extent that similar cases may now be in the judicial process,[5] the Court may feel that further exploration by appellate courts in light of the opinion of the court below is a more orderly way to proceed.

3. The foregoing analysis finds support in the recently enacted Narcotic Addict Treatment Act of 1974, P. L. 93-281, 93rd Cong., 2nd Sess. That Act, at one and the same time, enforces the original congressional scheme in the Controlled Substances Act to require the registration of those within the legitimate delivery chain and to punish severely those operating outside registered channels, and eases the government's burden in deregistering those who abuse their registration. Specifically, the Act amends Section 823 of the Controlled Substances Act, 21 U.S.C. § 823, to provide for the specific registration of those dispensing narcotic drugs *either* for maintenance *or* detoxification purposes and amends Section 304 of the Controlled Substances Act, 21 U.S.C. § 824, by specifically providing for easier deregistration of those guilty of misconduct, thereby placing them outside the regulated scheme and amenable to the more severe penalties provided by Section 841 of the Controlled Substances Act, 21 U.S.C. § 841. This intent, although readily divined from the precise language of the Narcotic Addict Treatment Act of 1974 itself, is made even more clear by the accompanying report of the Interstate and Foreign Commerce Committee of the House of Representatives. H. Rep. 93-884, 93rd Cong., 2nd Sess., March 7, 1974. That Report notes the purpose of the bill: "The bill defines

[5] Respondent is aware of none (save that noted in Petition, 13, fn. 17) and the Petition offers no enlightment on this issue.

what is meant by the terms 'maintenance treatment' and 'detoxification treatment', and requires separate DEA [6] registration for practitioners who dispense narcotic drugs to individuals for maintenance treatment, detoxification treatment, or both." U.S. Code Congressional and Administrative News (1974), Adv. No. 5, 1073, at 1076-1077. The Report goes on to consider deregistration and the result thereof.

> "In order to qualify for registration the applicant must demonstrate that he can fulfill, and will observe, the medical standards of FDA and the security and diversion standards determined by DEA. Applicants must comply with standards established by FDA (after consultation with DEA) respecting the quantity of narcotic drugs for unsupervised use provided to individuals enrolled in treatment. As with other medical matters, the setting and use of this 'take home privilege', is a matter best determined by the Department of Health, Education, and Welfare, after consultation with the Department of Justice. *The bill further provides that DEA may suspend or revoke a registration for failure to comply with the standards set forth by FDA or DEA.* The suspension or revocation of the registration will not be general. It will apply only to the registration under which the violation of the standards occurred and have no prejudgment effect on any other registration which the practitioner may hold. This provision will clarify and facilitate the law enforcement options available to DEA. *The activities of unregistered persons would be placed in the same legal category as those of any other illicit traffickers.* Proof of guilt of such activities would constitute *prima facie* violation of the felony

[6] The Drug Enforcement Administration is the successor to the Bureau of Narcotics and Dangerous Drugs.

> statutes. This would be true regardless whether lack of registration is a result of failure to apply for registration, failure to be granted approval, or suspension or revocation of a prior approval." *Id.* (Emphasis supplied)

Perhaps more importantly, in describing the deregistration provisions of the new Act, and the manner in which they affect deregistration under the Controlled Substances Act, the House Report reads as follows:

> "Under current law, the registration of a practitioner can only be revoked if he does not have a State license, has been convicted of a felony, or has fraudulently applied for registration. This has made it difficult for the Attorney General to take action in those instances in which he believed that a treatment program or detoxification program was not being properly conducted. This new subsection provides that in such instances, the Attorney General may immediately revoke or suspend the registration of any practitioner who does not meet the standards set forth in section 303 (g)." *Id.*, at 1079.

Thus, the new Act recognizes what the Congress has all along intended and what the court below quite properly discerned—that the universe of those controlled is divided into registrants who are, and continue to be, subjected to administrative sanctions and less severe criminal penalties, and non-registrants who are subject to the more serious criminal penalties provided for narcotics traffickers. Moreover, it eases the governments burden in deregistering those thought to have abused their registration, thus rendering them more amenable to these more serious criminal penalties if they persist in their actions.

To this extent, the new statute underscores and validates the interpretation given the Controlled Substances Act by the court below and, to the extent that the opinion of the court below either created or recognized the existence of problem areas for enforcement of the earlier statute, the new Act treats with many of them.

The Respondent submits that, viewing the opinion of the court below in light of the recently enacted Narcotic Addict Treatment Act, the Court may be dealing with an issue affecting so few cases in the past (and presenting an issue unlikely to arise in the future) as not to commend itself to plenary review at this time. In Respondent's view, the Narcotic Addict Treatment Act of 1974 with it enhanced registration requirements and deregistration provisions, solves the problems which the Petition suggests were created "in the enforcement of the federal narcotics laws" by the opinion of the court below. Petition, 9.

CONCLUSION

In light of the foregoing, the Respondent respectfully submits that the petition should be denied.

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No. 74-759

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulation involved	2
Statement	2
Summary of argument	14
Argument:	
A physician, registered under the Controlled Substances Act, is not immune from prosecution under the primary felony provision of the Act, 21 U.S.C. 841, when he distributes a controlled substance other than for a legitimate medical purpose	18
A. The language and the statutory scheme of the Controlled Substances Act show that a physician may be prosecuted under the primary felony provision of the Act, 21 U.S.C. 841(a), for trafficking in narcotic drugs	20
B. The legislative history of the Controlled Substances Act makes clear that Congress did not intend to change prior law under which physicians who trafficked in drugs were subject to prosecution for unlawful distribution	33
Conclusion	45
Appendix	1a

CITATIONS

Cases: Page

Hecht v. *Malley*, 265 U.S. 144 34
Jin Fuey Moy v. *United States*, 254 U.S. 189 .. 17, 35–37
Linder v. *United States*, 268 U.S. 5 ..... 35, 37
Shapiro v. *United States*, 335 U.S. 1 34
Spies v. *United States*, 317 U.S. 492 31
United States v. *Badia*, 490 F. 2d 296 ..... 24, 44
United States v. *Bartee*, 479 F. 2d 484 44
United States v. *Behrman*, 258 U.S. 280 ..... 17, 37
United States v. *Black*, C.A. 9, No. 73–3003, decided March 11, 1975 24
United States v. *Collier*, 478 F. 2d 268 .... 28–29, 44
United States v. *Green*, C.A. 7, No. 74–1428, *et al.*, decided February 27, 1975 .. 25, 29, 30, 43, 44
United States v. *Jobe*, 487 F. 2d 268 44
United States v. *Kapsalis*, 313 F. 2d 875, certiorari denied, 374 U.S. 856 34–35
United States v. *Larson*, 507 F. 2d 385 44
United States v. *Leigh*, 487 F. 2d 206 ..... 24, 44
United States v. *Rosenberg*, C.A. 9, No. 74–2197, decided March 31, 1975 ..... 22, 24, 25, 28, 40, 44
Webb v. *United States*, 249 U.S. 96 ..... 17, 35, 37

Statutes and regulations:

Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, Pub. L. 91–513, 84 Stat. 1242 (Controlled Substances Act), 21 U.S.C. 801–904:

Sec. 802 ..... 29, 1a
Sec. 802(10) 15, 23, 1a
Sec. 802(20) 3, 16, 23, 34, 2a
Sec. 812(a) 21, 2a
Sec. 812(b) 21, 3a
Sec. 812(b)(2) 3, 3a

Statutes and regulations—Continued

Controlled Substances Act—Continued Page

Sec. 812(c) 3, 21, 3a
Sec. 821 ..... 5a
Sec. 822 ..... 15, 22, 5a
Sec. 822(a) 22, 5a–6a
Sec. 822(b) 22, 6a
Sec. 823 ..... 25, 7a
Sec. 823(a) 25, 7a
Sec. 823(a)(1) 25, 7a
Sec. 823(b) 25, 8a
Sec. 823(b)(1) 25, 8a
Sec. 823(c) 22, 8a
Sec. 823(f) 3, 25, 26, 10a
Sec. 824 ..... 31, 32, 11a
Sec. 824(a)(1) 31, 11a
Sec. 824(a)(2) 32, 11a–12a
Sec. 824(a)(3) 31, 12a
Sec. 824(c) 32, 12a–13a
Sec. 827 ..... 13a
Sec. 827(c) 26, 14a–15a
Sec. 828 ..... 16a
Sec. 828(e) 30, 17a
Sec. 829 ..... 29, 17a
Sec. 829(a) 29, 17a
Sec. 841 ..... *passim*, 17a
Sec. 841(a) 2, 15, 16, 18, 20, 21, 44, 17a
Sec. 841(a)(1) 3, 4, 24, 17a
Sec. 841(b)(1) 21, 18a
Sec. 842 ..... 16, 27, 28, 29, 30, 19a
Sec. 842(a)(1) 28, 29, 19a
Sec. 842(a)(2) 28, 19a
Sec. 842(a)(3) 28, 19a
Sec. 842(a)(4) 28, 19a
Sec. 842(a)(6) 20a
Sec. 842(a)(7) 28, 20a

Statutes and regulations—Continued
Controlled Substances Act—Continued Page
Sec. 842(c)(2) 27, 21a
Sec. 843 ..... 16, 27, 28, 29, 30, 32, 21a
Sec. 843(a)(1) 28, 21a
Sec. 843(a)(2) 28, 22a
Sec. 843(a)(3) 28, 22a
Sec. 843(a)(5) 28, 22a
Sec. 843(b) 28, 22a
Sec. 845 ..... 39, 23a
Sec. 848 ..... 39, 24a
Drug Abuse Control Amendments of 1965, 79 Stat. 226, 21 U.S.C. (Supp. V, 1964 ed.) 321, *et seq.*:
Sec. 360a(a) 34
Sec. 360a(b) 34
Harrison Narcotic Act of 1914, 38 Stat. 785, as amended, 26 U.S.C. (1964 ed.) 4701, *et seq.*:
Sec. 4704 ..... 26a
Sec. 4704(a) 33, 26a
Sec. 4704(b)(1) 34, 27a
Sec. 4704(b)(2) 34, 27a
Sec. 4705 ..... 33, 27a
Sec. 4705(a) 13, 27a
Sec. 4705(c)(1) 33, 28a
Sec. 4705(c)(2) 34
Sec. 4722 ..... 33, 28a
Marihuana Tax Act, 26 U.S.C. (1964 ed.) 4742(b)(1) 34
Narcotic Addict Treatment Act of 1974, Pub. L. 93–281, 88 Stat. 124, *et seq.*:
21 U.S.C. 802(27), 88 Stat. 124 ..... 4, 2a
21 U.S.C. 802(28), 88 Stat. 124 ..... 4, 2a
21 U.S.C. 823(g), 88 Stat. 124–125 ..... 26, 10a–11a
21 U.S.C. 824(a), 88 Stat. 125 ..... 31, 11a
21 U.S.C. 824(d), 88 Stat. 125 ..... 31, 13a

Statutes and regulations—Continued
Narcotic Addict Treatment Act of 1974—Con. Page
21 U.S.C. 827(c)(1), 88 Stat. 125 ..... 26, 14a–15a
84 Stat. 1236, Preamble 38
2 D.C. Code 131 ..... 5, 6, 32
21 C.F.R. (1973 ed.):
Sec. 306.04 ..... 2, 25a
Sec. 306.04(a) 4, 25a–26a
Sec. 306.04(c) 4, 26a
Sec. 306.07 4
21 C.F.R. 1306.04 (1974 ed.) 2
Miscellaneous:
Baumgartner and Morrell, *Pharmaceutical Industry Regulation by the Department of Justice*, 23 Syr. L. Rev. 785 (1972) 3, 22, 26, 32
116 Cong. Rec. 1663 (1970) 40
116 Cong. Rec. 1664 (1970) 42
Greene, Brown and DuPont, *Controlling the Abuse of Illicit Methadone in Washington, D.C.*, 32 Arch. Gen. Psychiatry 221 (1975) 40, 41
Hearings on S. 1895, S. 2590, S. 2637, Narcotics Legislation, before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969) 40
Hearings on H.R. 11701 and H.R. 13743 and related bills, Drug Abuse Control Amendments, before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970) 40, 42
H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. (1970) 38, 39, 42–43

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 505 F. 2d 426.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on October 18, 1974. On November 14, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 17, 1974. The petition was filed on the latter date and was granted on February 18, 1975 (App. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a licensed physician, registered under the Controlled Substances Act to prescribe and dispense certain controlled substances for legitimate medical purposes, is immune from prosecution under the felony provision of the Act prohibiting the unlawful distribution or dispensation of a controlled substance.

STATUTES AND REGULATION INVOLVED

Because of their length, the pertinent provisions of the Controlled Substances Act (Pub. L. 91–513, 84 Stat. 1242, 21 U.S.C. 801, et seq.),[1] relevant sections of other statutes and the pertinent regulation, 21 C.F.R. 306.04 (1973 ed.),[2] are set forth in the appendix to this brief.

STATEMENT

1. Respondent is a physician who, at the time of the events in question, was licensed to practice medicine in the District of Columbia and registered under the Controlled Substances Act to prescribe methadone.[3] He

[1] Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1242, is designated the Controlled Substances Act (21 U.S.C. 801 through 904). Throughout this brief, references to sections of the Controlled Substances Act will be to section numbers of the Act as codified, *e.g.*, 21 U.S.C. 841(a).

[2] This regulation was redesignated 21 C.F.R. 1306.04 in the 1974 revision of Title 21 of the Code of Federal Regulations.

[3] A "license" is issued by the state (or here, the District of Columbia, through its Commission on Licensure to Practice the Healing Art) to enable a medical practitioner to engage in his profession. Generally two "registrations" are issued to enable a licensed practitioner to handle drugs or—to use the term employed by the statute—controlled substances. One registration is issued by the Attorney General, who has delegated his authority to the Drug Enforcement Agency (DEA) or, at the time of the events at issue here, its predecessor, the Bureau of Narcotics and Dangerous Drugs (BNDD); and the other registration is issued by the state or other licensing authority. See Baumgartner and Morrell, *Pharmaceutical Industry Regulation by the Department of Justice*, 23 Syr. L. Rev. 785, 810–813 and n. 65 (1972). In the case of a "practitioner"—defined in 21 U.S.C. 802(20), as, *inter alia*, "a physician, dentist, veterinarian, scientific investigator, pharmacy [or] hospital * * *"—registration by the DEA is mandatory in most instances (and was mandatory in all cases, at the time respondent received his registration) if the practitioner is authorized to dispense drugs or conduct research under the law of the state in which he practices. 21 U.S.C. 823(f). See Baumgartner and Morrell, *supra*, 23 Syr. L. Rev. at 810–811.

was charged in a 639-count indictment filed on June 27, 1972, in the United States District Court for the District of Columbia, with the unlawful distribution and dispensation of methadone (dolophine), a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1).[4] The indictment alleged that over a five and one-half month period, from September 27, 1971 to February 9, 1972, respondent had illegally distributed and dispensed methadone on repeated occasions to twenty-five different persons (App. 3–29).

At the court's request, the government orally gave a more explicit statement of the theory of its case. In brief, that theory was that respondent had issued methadone prescriptions other than for purposes of detoxification in the course of a legitimate profes-

[4] A Schedule II controlled substance is a "drug or other substance [which] has a high potential for abuse * * * [, which] has a currently accepted medical use in treatment * * *," and the abuse of which "may lead to severe psychological or physical dependence." 21 U.S.C. 812(b)(2). See 21 U.S.C. 812(c)(Schedule II)(b)(11).

sional practice[5] and thereby violated 21 U.S.C. 841 (a)(1).[6]

[5] As established by expert testimony at respondent's trial, methadone is an addictive drug used in the treatment of heroin addicts. It reduces or eliminates the addict's craving for heroin while, if properly administered, it does not produce the euphoric "high" of heroin. There are two primary methods in which methadone is used in the treatment of addicts: "detoxification" and "maintenance." Detoxification involves giving the addict a large dose of methadone for the first few days of treatment in order to keep him free from withdrawal symptoms, after which the dose is gradually reduced, ultimately to achieve abstinence from all drugs. Maintenance involves giving the addict a fixed dose of methadone once a day for an indefinite period in order to keep him from taking heroin. (Tr. 337–424, 435–474, 551–574). At the time of respondent's conduct, there were no statutory definitions of detoxification and maintenance; but the Narcotic Addict Treatment Act of 1974, Pub. L. 93–281, 88 Stat. 124, subsequently has provided definitions. See 21 U.S.C. 802(27) and (28).

[6] The government's theory, received by the court as "in the nature of a Bill of Particulars" (App. 37), was in two parts. First, the Controlled Substances Act permits a doctor registered under the Act to dispense drugs covered by his registration, if the drugs are dispensed in the course of his professional practice (App. 35). 21 C.F.R. 306.04(a) (1973 ed.) restates this limitation of a doctor's authority to dispense through prescriptions, which must "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his medical practice." The government contended that "the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and * * * that he was not acting in the usual course of his professional practice" (App. 36).

Second, 21 C.F.R. 306.04(c) (1973 ed.) prohibits prescribing narcotic controlled substances "to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs * * *." While 21 C.F.R. 306.07 (1973 ed.) allows the "administering or dispensing directly" of such drugs for drug maintenance, it does not permit—and section 306.04(c) expressly forbids—prescribing controlled substances for the purpose of maintenance. The government intended to prove that respondent "was not issuing * * * prescriptions to detoxify [addicts], but retaining them as drug addicts" (App. 36–37).

In October, 1972, respondent was tried on an indictment which had been reduced to 40 counts (Tr. 4–5),[7] charging the unlawful distribution and dispensation of methadone from September 27, 1971 to February 9, 1972, to nine of the twenty-five recipients originally named in the indictment.[8] The jury convicted respondent on 22 counts. Respondent was sentenced to concurrent terms of five to fifteen years' imprisonment on fourteen counts, and to concurrent terms of ten to thirty years' imprisonment on the remaining eight counts, the latter group to run consecutively to the former. He was fined a total of $150,000, a special parole term of twelve years was imposed on each count (to run concurrently as to all counts), and his license to practice medicine in the District of Columbia was revoked pursuant to 2 D.C. Code 131 (App. 139–141).[9]

[7] References to the transcript will be to the appendix filed in this Court when the transcript excerpts have been included therein. Otherwise, transcript references will be to transcript pages only, with the exception of the transcript of October 20, 1972, which is separately paginated and will be referred to as "Tr. V."

[8] The government dismissed two of these 40 counts at the close of its case, and 38 counts were submitted to the jury for its consideration. The indictment as submitted to the jury is included in the appendix filed in this Court. See App. 30–34.

[9] 2 D.C. Code 131 provides that if a licensed or registered physician is "convicted in the District of Columbia of any felony, the court, without further hearing or procedure, may suspend * * * or may revoke, the license or registration of the defendant, in addition to imposing any other penalty pro-

2. The evidence at trial established that respondent systematically prescribed methadone in a manner inconsistent with any accepted form of medical treatment of addicts—whether by detoxification or maintenance.[10] It demonstrated that he engaged in conduct that the court of appeals described as "highly irregular practices" (Pet. App. 4a):

> 1. He prescribed methadone in whatever quantities the patient requested;
> 2. His fees were graduated in accordance with the quantity of methadone prescribed;
> 3. He did not make certain that the patients for whom he was prescribing methadone were addicts. Some were not, and some delivered their methadone to nonpatients.

Respondent's operation was of vast magnitude. Between September 1, 1971, and February 11, 1972, 11,169 prescriptions for dolophine tablets written by

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vided by law." It also provides, however, that "[a]n appeal by the defendant in any such case from the conviction of the offense shall act as a suspersedeas to the judgment of the court suspending or revoking his license or registration."

[10] Respondent's defense at trial with respect to all of the counts was that he had prescribed methadone in good faith for the purpose of detoxification (Tr. 649). He did not object to the following jury instruction (App. 123):

"Thirdly, you must also find beyond a reasonable doubt that a physician, who knowingly or intentionally, did dispense or distribute by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." See Tr. V 67–69, 72–79, 149. In any event, federal regulations applicable to respondent at the time prohibited the prescribing of narcotic drugs for other than detoxification purposes. See note 6, *supra*.

respondent were filled at three pharmacies in the District of Columbia.[11] Of these, 5,486 prescriptions were for 50 tablets each; 1,126 were for 75 tablets; 4,225 were for 100 tablets; 214 were for 150 tablets; 9 were for 200 tablets; 5 were for 300 tablets; and 109 were for miscellaneous quantities. There were 54 days when respondent wrote more than 100 prescriptions (App. 74–77; Gov't. Exhs. 22A, 22B and 22C). In other words, in a five and one-half month period, respondent wrote prescriptions for more than 800,000 dolophine tablets.

Respondent had a "sliding-fee scale" of charging patients which was pegged solely to the quantity of pills prescribed and had no relationship whatsoever to the medical services purportedly performed. Thus, he charged $15 for a fifty-tablet prescription, $25 for seventy-five tablets, $35 for 100 tablets and $50 for 150 tablets (App. 104; Tr. 661–662). If a "patient" did not have the money to pay, respondent refused to give him a prescription (Tr. 231). At these rates, for the number of dolophine tablets prescribed, respondent took in at least $260,000 in five and one-half months.

While respondent claimed to have prescribed only to addicts for purposes of treatment, the evidence at trial showed that he made only the most superficial examinations to determine initially whether his patients were in fact addicts. This consisted typically of a request to see the addict's needle marks on his arm—which in more than one instance were simulated (Tr.

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[11] There may have been additional prescriptions filled elsewhere.

256; App. 91); a urinalysis—which was unsupervised (App. 47; Tr. 496), was easily falsified (Tr. 258) and whose results respondent regularly ignored (App. 50, 95; Tr. 344); and the question, "What can I do for you?" (App. 49; Tr. 249, 501). The patient then received either liquid methadone or dolophine tablets (a form of methadone). On return visits—for which no appointments were ever scheduled—no physical examination was performed at all (App. 50, 94), and the patient received a prescription for whatever quantity of methadone tablets he requested (App. 51, 52, 94, 96).

In these circumstances, it is not surprising that many of the persons for whom respondent wrote prescriptions were not then and, in some cases, never had been narcotic addicts in need of methadone for purposes of treatment.[12]

Respondent generally did not inquire about the daily dosages of his patients, and he gave no instructions for the use of the drugs prescribed except to refer the patient to the label on the prescription bottle which read "Take as directed for detoxification" (App. 67, 69–70; Tr. 210, 303). Predictably, many of

[12] For example, Jerome Brooks testified that when he first went to see respondent he had not taken any narcotics for almost five years (App. 68); Ivan Gower testified that he was not an addict when he went to respondent's office (App. 59); William Burgee testified that he never had been an addict but entered respondent's program in order to get dolophine tablets for a friend (Tr. 247–250); and Metropolitan Police Officer Karen Bryan (who used the name "Lynn Ryan" when she went to respondent's office in an undercover capacity pretending to be an addict) testified that she had never been a user of narcotics (App. 47).

the patients simply used the tablets to get "high" (App. 43, 58, 63); others sold them on the street (App. 43, 70–71) or gave them to a friend (Tr. 248) or relative (Tr. 304–305). One witness testified that he would consume whatever quantity was necessary for him to get high and sell the rest for $1.50 per tablet (App. 43); another sold the pills to other persons for one dollar each whenever he needed money to buy more (App. 71); and yet another pointed out that the price of methadone on the street rose to about $2 a pill when respondent's office was finally closed (App. 64).[13]

Respondent conceded that he kept inadequate records of his dispensing. His records failed, for example, to show several prescriptions issued to Herbert

[13] Typical of respondent's "patients" was Forris Ensor, who originally came to respondent because he was "strung out on dilaudid" (Tr. 162–163). During the period in question he received 26 prescriptions from respondent totalling 2,575 dolophine tablets. At first Ensor was told by respondent that he would have to detoxify himself within 21 days, but when he heard nothing further about detoxification, "[he] just kept coming" (App. 53–56; Gov't Exh. 5). He went from five to 70 dolophines a day without respondent questioning him about the increasing dosages (App. 53–54, 57; Tr. 194). When Ensor left respondent's "program" in January 1972 to enter a treatment center in Baltimore, his methadone habit was bigger than his earlier dilaudid habit (Tr. 189, 192). He testified at trial that the methadone habit "for me, right now, it is impossible to get off. * * * I could have just locked myself in a room for a week and * * * [withdrawn from dilaudid]. I wouldn't have done it but it would have been easier than methadone. Methadone takes such a long time. It is just a long, drawn-out sickness, and you just—I would rather be dead" (Tr. 193–194). Eight other "patients" testified about similar experiences. See the case histories described in the court of appeals' dissenting opinion (Pet. App. 23a–26a).

Holland, who went from 100 dolophine tablets in September to 625 in January and 300 in the first eight days of February (Tr. 758–759; Gov't Exh. 16). When asked to explain his faulty record-keeping, respondent blamed his hectic schedule (Tr. 760) or the "terrible crush of people" in his office (Tr. 747).[14] In one instance, he stated, the patient "might have caught me in the drug store across the hall. * * * I also carry a script pad on me" (Tr. 740).

Respondent testified that his "method of treatment" depended on the "mental decision" of the addict that he had had enough methadone and was ready to be "deintoxified" (Tr. 658–660). Respondent said he would aid the patient in reaching this point by "counseling" (App. 103), but he apparently attached little importance to this approach. For example, one witness, who went to respondent's office two or three times a week over a five month period, testified that his visits lasted no more than thirty to sixty seconds (App. 72), hardly time for in-depth counseling. When respondent was asked where he would have found the time to consult with or counsel his patients on January 5, 1972, when he wrote 271 prescriptions, he replied: "One would have to assume from that * * * that I talked very fast or I write very fast, and possibly both" (App. 103).

Two expert witnesses for the government, Dr. David H. Fram and Dr. Thomas E. Piemme, both registered and licensed physicians, defined the scope of

[14] Respondent testified that he had "patients" coming from as far away as Atlantic City and South Carolina (Tr. 640–642).

accepted medical practice in the treatment of narcotic addicts by either detoxification or maintenance, and discussed the procedures to be followed in such treatment (App. 78–90; Tr. 405–406). In order to avoid abuse, such as "[o]verdose death, not only to patients but to others who may inadvertently use it or to whom it may be sold" (App. 88), certain procedures were considered essential in all such programs. They included a complete physical examination at the outset, adherence to the results of tests, and initial administration of the methadone at the clinic daily under the direct scrutiny of the staff (App. 84–86)—practices respondent did not follow. Dr. Fram described the detoxification procedures of the District of Columbia Drug Abuse Treatment Center, saying that during the first sixty days all methadone was dispensed and consumed at the Center under the observation of a nurse (App. 80; Tr. 388–390). No prescriptions were ever written for methadone because "it is not considered good medical practice" (App. 80; Tr. 412–413).

Both doctors were asked hypothetical questions based on the testimony of witnesses who had received methadone prescriptions from respondent. Dr. Piemme was asked about the procedures followed by respondent in treating Herbert Holland, who had received 100 ten-milligram tablets from respondent on a single day (App. 72, 87–88). Dr. Piemme responded: "That is not acceptable practice in any program that I know of anywhere in the country [for either detoxification or maintenance]" (App. 88). He said that an

addict "[e]ven [with] the largest [heroin] habit one could conceive" would not require more than eighty to one hundred milligrams of methadone a day to "block the euphoria." Patients already addicted to very large doses of methadone "can very quickly, within a matter of a day or two, be brought down to 80 to 100 milligrams of methadone a day and maintained there" (App. 89–90).

Dr. Piemme saw nothing in respondent's procedures that would justify characterizing them as "a new, effective, good-faith technique in the treatment, detoxificational cure of an addict" (Tr. 474).[15]

Dr. Fram characterized respondent's "sliding-fee scale" based on the number of tablets prescribed as not acceptable medical practice in the District of Columbia (Tr. 396–397):

[15] When asked a hypothetical question based on the procedures employed by respondent in his treatment of Roger Wheeler, Dr. Fram stated that such procedures were not acceptable medical practice for detoxification or maintenance in the District of Columbia or in the United States. They involved serious medical dangers (App. 80–83):

"One doesn't know whether he is taking it, whether somebody else is taking it. You don't know whether a child is taking it. If you are trying to detoxify a person, you don't know whether the person is being detoxified or whether they are taking more each day. Also, you have no idea if the individual is indeed taking it at all. Maybe he is continuing on heroin and selling the methadone."

When asked a second hypothetical question based on the experience of undercover officer Karen Bryan, who received three dolophine prescriptions from respondent after her urine test had come back negative for narcotics, Dr. Fram said that this was not acceptable medical practice, that he would wonder whether the patient was an addict at all, and that he would not think of giving her methadone if she was not (App. 83).

> I would say not. Accepted medical practice is that the physician treats the patient and charges for that. If a prescription is given, that is part of the treatment. What the prescription is or how many pills are given does not determine what the price is.

Dr. Piemme agreed: "That is not only not acceptable medical practice; that is unethical medical practice" (App. 89).[16]

[16] Respondent himself was thoroughly familiar with the standards of accepted medical practice in his field at the time of the events charged. His first treatment program in 1969, which was a combination of "long term" and "short term" detoxification (Tr. 605), had ended with his arrest for violations of the Harrison Narcotic Act (26 U.S.C. (1964 ed.) 4705(a)). After he testified before a grand jury and made "firm statements" that he would not engage in certain practices in regard to the prescription of methadone, the charges against him were dismissed (App. 97–100). He subsequently received from his attorney a memorandum of a meeting between respondent and an Assistant United States Attorney (App. 116, 135–138), at which respondent had agreed to abide by specific medical procedures in any future methadone program. These procedures included obtaining the medical history of patients, conducting a reasonably thorough physical examination, abiding by the results of urine tests, recording times and amounts of dosages and either having the methadone administered in his office or prescribing only so much as would be necessary for a daily dosage. At rial, however, respondent admitted having violated most of these agreements (App. 97–100, Tr. 533, 689–704, 707–711, 742–751, 753–754, 758–760, Tr. V 4).

Respondent also identified at trial a letter he had received from the Food and Drug Administration after inspection by that agency on April 2, 1971 of a methadone maintenance program he had established in July of 1970 with FDA approval. The letter set forth four changes respondent would be required to make in order to avoid losing his authorization to conduct this program. These included monitoring his patients'

3. A divided court of appeals reversed respondent's conviction. The court (per Chief Judge Bazelon) assumed that respondent had "acted wrongfully" (Pet. App. 7a). It nevertheless held that his conviction under 21 U.S.C. 841 could not be sustained because physicians registered under the Controlled Substances Act are exempt from prosecution under that section of the Act. The court based this conclusion both on "the overall scheme of the Act" (*id.* at 8a) and its legislative history, which demonstrated—the court said—Congress' intention "to treat registered and unregistered individuals differently" (*id.* at 12a). Judge MacKinnon, dissenting, rejected the majority's analysis as unsupportable by the terms of the statute, by its legislative history, and by "plain common sense" (Pet. App. 20a).[17]

SUMMARY OF ARGUMENT

Despite the overwhelming evidence at trial that respondent, a medical doctor, operated far beyond the pale of accepted medical practice, the court of appeals

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ingestion of methadone daily during the initial weeks of treatment and insuring that patients' urine specimens were collected under supervision with the results recorded for evidence of drug dependence. At trial, respondent admitted having violated these requirements. On July 28, 1971, respondent's authorization for the maintenance program was revoked (App. 107–116).

[17] Despite its reversal of respondent's conviction, the court of appeals stayed the issuance of its mandate and denied respondent's motion for immediate release on the ground that there were no conditions of release that would reasonably assure that he will not flee. On December 23, 1974, this Court denied respondent's application for release pending disposition of the petition for a writ of certiorari.

reversed his conviction on the ground that he was prosecuted under the wrong section of the Controlled Substances Act. The court held that the authorization of a physician to dispense controlled substances for legitimate medical purposes immunizes him from prosecution under the primary felony provision of the Act, 21 U.S.C. 841(a), even when he distributes narcotic drugs for clearly illegitimate purposes, and that Congress intended to exempt trafficking doctors—merely because they were doctors—from the penalties applicable to other traffickers in narcotic drugs. In reaching this conclusion, the court of appeals misread the language, the scheme and the history of the Controlled Substances Act.

1. 21 U.S.C. 841(a) makes it unlawful for "any person" to "distribute or dispense" a controlled substance, except insofar as his conduct is "authorized" by subchapter I of the Controlled Substances Act. No other provision of the Act authorizes trafficking in drugs under the guise of practicing medicine, and there is no implication in the Act that physicians are exempt from punishment under section 841 when they go beyond the bounds of professional practice to engage in such conduct. Indeed, the only authorization for physicians to deal in drugs is section 822, which requires those who deal legitimately in controlled substances to register annually with the Attorney General. Such registration, however, provides no blanket authority to distribute controlled substances, but authorizes dispensing only "by, or pursuant to the lawful order of, a practitioner" (21 U.S.C. 802 (10))—

a term which by definition includes physicians (see 21 U.S.C. 802(20))—"in the course of professional practice or research." 21 U.S.C. 802(20). Under this limited statutory authorization, when physicians distribute or dispense other than in the course of professional practice, they exceed their authorization, cease to be practitioners under the Act, and are then covered by the prohibitions of section 841(a), like anyone else.

The court of appeals concluded that because the penalty provisions in two other sections of the Act (sections 842 and 843) specifically refer to "registrants"—a word that does not appear in section 841—registrants are subject only to those penalty provisions that specifically refer to them. Although some subsections of sections 842 and 843 refer expressly to "registrants," other subsections are like section 841 in that they refer to conduct by "any person." Thus, all three penalty provisions of the Act—sections 841, 842 and 843—apply to "any person"; they focus on the actor's conduct rather than on his status as a registrant or non-registrant. Moreover, because neither section 842 nor 843 makes it a crime for a registered practitioner to distribute drugs other than for a legitimate medical purpose, the court of appeals' conclusion that registrants are governed only by sections 842 and 843 produces the anomalous result that Congress provided no criminal sanction for a registered practitioner who distributes a controlled substance for such a purpose, although such a distribution obviously is not "authorized" by the Act.

The court of appeals also erred in concluding that

Congress intended to exclude registrants from the reach of section 841 because it already had provided adequate "administrative controls" to curtail the prescription of controlled substances other than for legitimate medical purposes. The government's authority effectively to utilize those controls, however, is substantially dependent upon the power to prosecute for felony violations under section 841.

2. In describing the conduct that is "authorized" by practitioners under the Controlled Substances Act (dispensing controlled substances "in the course of professional practice or research"), Congress used virtually the same language it had in the predecessor statute, the Harrison Narcotic Act (dispensing narcotic drugs to a patient by a physician "in the course of his professional practice only"). In a series of decisions under the Harrison Act, this Court held that a physician whose dispensation or prescription of drugs amounted to trafficking in drugs was not engaged "in the course of his professional practice only." See *Webb* v. *United States,* 249 U.S. 96; *Jin Fuey Moy* v. *United States,* 254 U.S. 189; *United States* v. *Behrman,* 258 U.S. 280. By using the same language in the Controlled Substances Act as it had in the Harrison Act, Congress obviously intended that the same construction should be applied to that language, thus making the general criminal provisions of the new Act applicable to drug trafficking by physicians.

While the legislative history of the Controlled Substances Act reflects a congressional intention to make

several significant changes from the Harrison Act in order to make the punishment more rationally fit the crime charged, there is no indication that Congress intended to lessen or substantially alter the criminal liability of physicians who acted outside the bounds of professional practice by trafficking in narcotic drugs. To the contrary, the legislative history reflects a congressional awareness that unscrupulous physicians and other practitioners are a primary source of diversion of narcotic drugs into illegitimate channels and a purpose to provide the authorities with complementary regulatory and penal provisions which together could be used to prevent such diversion.

3. In view of the foregoing arguments, it is not surprising that every circuit that has considered whether physicians are subject to prosecution and conviction under section 841(a) of the Controlled Substances Act—except for the District of Columbia Circuit in the instant case—has concluded that they are.

ARGUMENT

A PHYSICIAN, REGISTERED UNDER THE CONTROLLED SUBSTANCES ACT, IS NOT IMMUNE FROM PROSECUTION UNDER THE PRIMARY FELONY PROVISION OF THE ACT, 21 U.S.C. 841, WHEN HE DISTRIBUTES A CONTROLLED SUBSTANCE OTHER THAN FOR A LEGITIMATE MEDICAL PURPOSE

The overwhelming evidence at trial demonstrated that respondent, a medical doctor, operated far beyond the pale of accepted medical practice in prescribing methadone. It showed that he did not

dispense methadone for legitimate detoxification purposes but rather, as the dissenting judge stated (Pet. App. 27a), he "preyed upon the insatiable cravings of those unfortunate victims he purported to treat solely to get their money."

As shown in the Statement, respondent's former "patients" and the undercover police officers who visited his office testified that respondent performed only the most superficial examinations, that he prescribed methadone in whatever quantities his "patients" requested, that his fees were graduated in accordance with the quantity of methadone prescribed and bore no relationship to the nature of the medical service purportedly rendered, that he made no effort to make certain that the persons to whom he prescribed methadone were in fact addicts, and that he adopted no procedures to assure that the methadone prescribed was not given to others or sold to addicts on the street. Two expert witnesses testified that the procedures employed by respondent could in no sense be viewed as acceptable medical practice. As the dissenting judge concluded (*ibid.*): "In short, Moore was a drug pusher, a trafficker in illegal narcotics," engaged in the indiscriminate sale of prescriptions for profit with only the barest pretense of a legitimate medical purpose or standard medical procedures.

Despite the abundance of evidence that respondent was no different from a street corner drug pusher although in medical garb, the court of appeals reversed his conviction on the ground that he was prosecuted under the wrong section of the Controlled Substances Act. The court held that the authorization

of a physician to dispense controlled substances for legitimate medical purposes immunizes him from prosecution under the primary felony provision of the Act, 21 U.S.C. 841(a), even when he distributes narcotic drugs for clearly illegitimate purposes, and that Congress intended to exempt trafficking doctors—merely because they were doctors—from the penalties applicable to other traffickers in narcotic drugs.

We submit that Congress did not intend such a bizarre result and that the court of appeals has misread both the language and the history of the statute. The result of the court's interpretation of the Act is that those with the greatest access to drugs and the opportunity to divert them to illegitimate uses—those registered under the Act—are subject to less significant penalties for illicit distribution than are other persons. Congress never intended to produce such an anomalous effect when it enacted the Controlled Substances Act to take the place of the Harrison Narcotic Act which—this Court repeatedly held—doctors violated by committing the same abuses in connection with "prescribing" narcotics for "patients" that respondent committed.

A. THE LANGUAGE AND THE STATUTORY SCHEME OF THE CONTROLLED SUBSTANCES ACT SHOW THAT A PHYSICIAN MAY BE PROSECUTED UNDER THE PRIMARY FELONY PROVISION OF THE ACT, 21 U.S.C. 841(a), FOR TRAFFICKING IN NARCOTIC DRUGS

1. 21 U.S.C. 841, subsection (a), of the Controlled Substances Act provides in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense * * * a controlled substance; * * *.[18]

Unless respondent's conduct was justified by the "[e]xcept as authorized" clause, it violated section 841. The words "any person" cover a physician, and respondent admittedly "distribute[d] or dispense[d] * * * a controlled substance." The question therefore is whether other provisions of subchapter I of the Act authorized respondent's trafficking in drugs under the guise of practicing medicine.

No other provision explicitly authorizes that conduct, and one normally would expect that if Congress intended to sanction it, the legislature would have specifically so stated. The court of appeals held, however, that certain sections of the Act by implication reflected a congressional intent to exempt persons in respondent's position from the general penalty provisions for illegal drug dealing in section 841. The statutory provisions interlace and are somewhat complicated, but they reflect no intention to exempt physicians from punishment under section 841 when they go beyond the bounds of professional practice to traffic in drugs.

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[18] Congress has established five "schedules" of controlled substances, based upon the drugs' varying potential for abuse, accepted medical uses, and the degrees of physical or psychological dependence to which they can lead. See 21 U.S.C. 812(a) and (b). Methadone is a Schedule II controlled substance. 21 U.S.C. 812(c) (Schedule II)(b)(11). In the case of a Schedule I or II controlled substance that is a narcotic drug, a violation of section 841(a) carries with it a maximum penalty of 15 years' imprisonment, a $25,000 fine, or both, for a first offense. A second or repeat offender is subject to as much as 30 years' imprisonment, a $50,000 fine, or both. 21 U.S.C. 841(b)(1)(A).

Section 822(a) requires "[e]very person who manufactures, distributes, or dispenses any controlled substance" to register annually with the Attorney General. Section 822(b) in turn provides that persons so registered "are authorized to possess, manufacture, distribute, or dispense such substances * * * to the extent authorized by their registration *and in conformity with other provisions of this subchapter*" (emphasis supplied).[19] See generally Baumgartner and Morrell, *Pharmaceutical Industry Regulation by the Department of Justice,* 23 Syr. L. Rev. 785, 790–791, 810–813 (1972).[20]

The "other provisions of this subchapter" that define the distribution and dispensation that section 822(b) authorizes for registrants are primarily cer-

[19] Because the controlled substances contained in Schedules I and II are those with the highest potential for abuse, registration of a distributor of controlled substances "shall not entitle a registrant to * * * distribute controlled substances in schedule I or II other than those specified in the registration." 21 U.S.C. 823(c).

[20] In *United States* v. *Rosenberg*, C.A. 9, No. 74–2197, decided March 31, 1975, slip op. 7, Judge Lumbard, speaking for the court, said of section 822:

"* * * [A]ccording to the legislative history that section was added merely to 'make it clear that persons registered under this title are authorized to deal in or handle controlled substances.' House Report at 4606. This section was not part of the original bill, so it can scarcely be called an essential part of the registration scheme. Indeed, it only says that registrants are authorized to do what the Act permits them to do. Thus, in the absence of any explicit direction from Congress, we think it inappropriate to interpret that section to work a major change in the prior enforcement pattern of drug laws which heretofore have not exempted doctors who acted outside the scope of their professional practice from the penal provisions that apply generally to all persons."

tain of the definitional sections of the Act. In the case of physicians, the definitions of "dispense", "dispenser", and "practitioner" set the bounds of the authority to dispense controlled substances. Section 802(10) defines "dispense" as follows:

> The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

Authorized dispensing, therefore, is by or pursuant to the lawful order of a "practitioner." A "practitioner" in turn is defined by section 802(20) as

> * * * a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance *in the course of professional practice* or research. [Emphasis supplied.]

Thus, the only persons authorized to "dispense" controlled substances are "practitioners" who are licensed, registered or otherwise permitted to deal in such substances, and they may deliver the substances

only pursuant to a "lawful order" and "in the course of professional practice or research." Registered physicians as such have no blanket authority to dispense controlled substances; they may do so only "in the course of professional practice." However, when they distribute or dispense other than in the course of professional practice—that is, other than for a legitimate medical purpose—they exceed that authorization and cease to be practitioners authorized to dispense under the Act. They are thus covered by the prohibitions of section 841.[21]

As the First Circuit held in *United States* v. *Badia,* 490 F. 2d 296, 298–299, the "combined effect" of the statutory definitions of "dispense" and "practitioner" is to "limit the meaning of 'dispense' to delivery of controlled substances by a physician who is acting in the course of professional practice or research" and to make delivery by a physician otherwise punishable under section 841(a)(1). The Seventh Circuit agrees:

> The term dispense is defined so as to include the prescribing of a controlled substance by a practitioner which is defined to include a registrant (physician or pharmacist) who acts within the course of professional practice. 21 U.S.C. § 802(10), (20). Since the wholesale selling of prescriptions for controlled substances is beyond the scope of professional practice, a physician (or pharmacist who participates in such a scheme) is not acting as a practitioner. Thus, if such an individual's actions are not that of a practitioner they are not authorized under the subchapter and the exception clause of section 841 does not apply. [*United States* v. *Green,* C.A. 7, No. 74–1428, *et al.,* decided February 27, 1975, slip op. 15 n. 20.]

See also *United States* v. *Rosenberg, supra,* slip op. at 3.

The restriction that authorized dispensing covers only legitimate medical or other purposes in the course of professional practice also explains why Congress provided for mandatory registration of practitioners (as distinguished from other classes of registrants) by the Attorney General "if they are authorized to dispense or conduct research under the law of the State in which they practice" (21 U.S.C. 823(f)),[22] and why it exempted from the stringent

[21] Since under the statute "dispensing" is by definition a lawful act when done by a registered practitioner, a practitioner who acts beyond the scope of his authorization is properly charged under 21 U.S.C. 841(a)(1) with "distributing" rather than with "dispensing." See *United States* v. *Badia,* 490 F. 2d 298 n. 4 (C.A. 1); *United States* v. *Black,* C.A. 9, No. 73–3003, decided March 11, 1975, slip op. 1–2; *United States* v. *Rosenberg, supra,* slip op. at 15. But see *United States* v. *Leigh,* 487 F. 2d 206 (C.A. 5). The conflict between the circuits on this point is not relevant here because respondent was indicted, tried and convicted for having "knowingly and unlawfully distributed and dispensed" controlled substances (App. 30–34).

[22] Under 21 U.S.C. 823, registration of manufacturers and distributors (*e.g.,* suppliers) is discretionary with the Attorney General; he must find in each case that registration will be consistent (in regard to the manufacture of Schedule I and II controlled substances) or not inconsistent (in regard to the manufacture or distribution of all other controlled substances) "with the public interest." 21 U.S.C. 823(a) and (b). In determining the public interest, the Attorney General must consider, *inter alia,* whether "effective controls against diversion of particular controlled substances" into other than legitimate medical scientific or industrial channels can be maintained. 21 U.S.C. 823(a)(1) and (b)(1). Registration of practitioners, on the other hand, requires no such finding. Practitioners are entitled

record-keeping requirements of the Act practitioners prescribing or administering controlled substances "in the lawful course of * * * professional practice * * *" (21 U.S.C. 827(c)).[23] See Baumgartner and Morrell, *supra,* 23 Syr. L. Rev. at 810–811.

Congress obviously believed that the standards of professional conduct under which practitioners are licensed to prescribe and administer drugs in the course of professional practice would themselves provide adequate safeguards against the diversion of controlled substances into illegitimate channels. This regulatory scheme, however, affords no basis for concluding that Congress intended to exempt from the general criminal provision of section 841 physicians who exceed the boundary of proper professional practice by dealing in drugs for profit—as respondent did.

2. The court of appeals emphasized that penalty provisions in two other sections of the Act (sections

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of right to registration "if they are authorized to dispense or conduct research under the law of the State in which they practice." 21 U.S.C. 823(f).

The Narcotic Addict Treatment Act of 1974 (NATA), Pub. L. 93–281 (May 14, 1974), 88 Stat. 124, amended section 823 by adding a new subsection (g), which requires practitioners who dispense narcotic drugs for maintenance or detoxification treatment to register separately for that purpose.

[23] 21 U.S.C. 827(c) was also amended by the Narcotic Addict Treatment Act of 1974. While practitioners are still generally exempted from the record-keeping requirements, the exemption does not apply to substances that they prescribe or administer "in the course of maintenance treatment or detoxification treatment of an individual." 88 Stat. 125 (21 U.S.C. 827(c)(1)(A)).

842 and 843) specifically refer to "registrants," but that that word does not appear in section 841; and it concluded that registrants are subject only to those penalty provisions that specifically refer to them. This conclusion rests on a misreading of the statutory scheme.

Sections 842 and 843 provide lesser penalties for less serious violations of the Act than the unauthorized distribution or dispensing that section 841 prohibits. Section 842 provides for a civil penalty of $25,000 or, if the violation was committed knowingly, for imprisonment of not more than one year, a $25,000 fine, or both, for minor violations committed during the authorized manufacture, distribution, or dispensing of controlled substances, which are misdemeanors.[24] Section 843 proscribes somewhat graver misconduct, such as the distribution of a controlled substance by a registrant without an order form or the acquisition of a controlled substance by fraud or misrepresentation, with penalties of imprisonment up to four years, a fine of up to $30,000, or both, for first offenders.[25]

Both of these sections, like section 841, apply to "any person" who violates them. Some of the substantive provisions, however, specifically prohibit acts by "registrants." By definition, therefore, these are

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[24] A repeat offender is subject to a $50,000 fine, a term of imprisonment of not more than two years, or both. 21 U.S.C. 842(c)(2)(B).

[25] A repeat offender may be fined up to $60,000, imprisoned for up to eight years, or both.

575-425—75——3

acts that only registrants could do,[26] and it was therefore necessary for Congress to use that word in defining certain of the conduct it made criminal in those sections. It does not follow, however, that Congress' failure to refer to "registrants" in the general prohibition in section 841 against "any person" engaging in unauthorized distribution or dispensation of controlled substances indicates an intention to exempt "registrants" from that provision. See *United States* v. *Rosenberg, supra,* slip op. at 8;

[26] Such as dispensation of a controlled substance by a registrant without the written prescription of a practitioner (21 U.S.C. 842(a)(1)); distribution or dispensation by a registrant of a controlled substance not authorized by the terms of his registration (21 U.S.C. 842(a)(2)); distribution by a registrant of a controlled substance not properly labelled (21 U.S.C. 842(a)(3)); or distribution by a registrant of a Schedule I or II controlled substance except pursuant to an order form (21 U.S.C. 843(a)(1)).

Persons other than registrants, however, may commit other violations of sections 842 and 843—for example, the removal, alteration or obliteration of a label on a controlled substance (21 U.S.C. 842(a)(4)); the removal, breaking, injuring or defacing of a seal placed on a controlled substance (21 U.S.C. 842(a)(7)); the use of a registration number which is fictitious, revoked, suspended or issued to another person (21 U.S.C. 843(a)(2)); the acquisition of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge (21 U.S.C. 843(a)(3)); the manufacture, distribution or possession of any punch, die, plate, stone or other thing designed to print or reproduce the trademark or other identifying mark on any drug or container so as to render such drug a counterfeit substance (21 U.S.C. 843(a)(5)); and the use of any communication facility in committing or facilitating the commission of any felony under subchapter I or II of the Controlled Substances Act (21 U.S.C. 843(b)).

United States v. *Collier,* 478 F. 2d, 268, 271–272 (C.A. 5); *United States* v. *Green, supra,* slip op. at 9.[27]

Moreover, neither section 842 nor 843 expressly prohibits a registrant from selling drugs or prescriptions for non-medical purposes. The result, as the dissenting judge pointed out (Pet. App. 45a), is that a distributor who violates the order form requirements may be imprisoned for four years (21 U.S.C. 843), but a physician or other practitioner who prescribes drugs other than for a legitimate medical purpose may go wholly unpunished or perhaps only be imprisoned for up to two years under section 842.[28]

[27] The term "registrant" is not defined in the definitional sections of the Controlled Substances Act (see 21 U.S.C. 802) and thus is not a term of art as are "dispense" and "practitioner." It would be most surprising if Congress' failure to use the word "registrant" in section 841 manifested an implicit congressional intent to exclude this group from the reach of what purports to be a generally applicable criminal penalty provision.

[28] The dissenting judge concluded that section 842 effectively does prohibit selling prescriptions for other than a legitimate medical purpose. He reasoned as follows: Section 829(a) requires a written prescription for a Schedule II controlled substance, and section 842(a)(1) makes it unlawful to distribute or dispense a controlled substance in violation of section 829. In the view of the dessenting judge, a prescription written other than for a legitimate medical purpose would actually be "fictitious * * * and thus not a valid prescription within the meaning of the Act" (Pet. App. 36a, n. 10). We believe, however, that section 829 by itself affords an uncertain basis for the criminal prosecution of a practitioner who follows the literal requirement of the section by writing out a prescription but prescribes other than for a legitimate medical purpose. The better analysis of the relationship between sections 829, 841 and 842, we believe, is as follows: Section 829 presupposes dispensing for a legitimate medical purpose and imposes additional requirements upon prescribing, violations of which are penalized by section 842; prescriptions issued other

See also *United States* v. *Green, supra,* slip op. at 10. As the dissent also noted (Pet. App. 39a), under the court's reading of the statute registrants cannot be prosecuted at all if they sell or give drugs directly to persons for other than legitimate medical purposes rather than write prescriptions for the same drugs to be filled at pharmacies—a result Congress surely could not have intended. It is equally unlikely that Congress prohibited the acquisition of drugs by a practitioner with the intent to distribute them other than for legitimate medical purposes (as it did in section 828(e)), but at the same time provided no prohibition against the actual distribution of drugs to ultimate users—the final and critical stage in the diversion of drugs to illicit use.

The proper reading of the Controlled Substances Act, then, is that all three penalty provisions apply to "any person," as they expressly state. All three focus on conduct rather than on the actor's status as a registrant or a non-registrant. Taken together, the three penalty provisions reflect a congressional intent to impose modest penalties for violations more or less dependent upon the registration scheme, but severely to punish trafficking by anyone—registrants or non-registrants. Moreover, because neither section 842 nor 843 makes it a crime for a registered practitioner to distribute drugs not in the course of professional practice, any other reading of the Act would mean that Congress provided no criminal

than for legitimate medical purposes, on the other hand, are wholly unauthorized by the Act and their issuance punishable under section 841.

sanction for a registered practitioner who distributes a controlled substance for such a purpose, although such a distribution is not "authorized" by the Act.

3. Finally, the court of appeals concluded that Congress intended to exclude registrants from the reach of section 841 because it already had provided adequate "administrative controls" in the Controlled Substances Act, which could be used to curtail the conduct of registered physicians who prescribe controlled substances other than for legitimate medical purposes.[29] The Act, however, makes the power of the government to proceed by these administrative means against registrants substantially dependent upon the power to prosecute for criminal violations under section 841.

Section 824 provides for the suspension or revocation of registrations by the Attorney General. At the time of respondent's conduct, however,[30] it permitted such action only if a registrant had filed a false application (21 U.S.C. 824(a)(1)), had had his state license revoked or suspended (21 U.S.C. 824(a)(3)), or had been convicted of a felony under drug-related

[29] Even if the court were correct in this reading of the Act, this fact would not preclude the application of criminal sanctions. Congress has often provided a variety of sanctions, both criminal and non-criminal, to regulate conduct; and the invocation of one does not preclude the existence of the other. See, *e.g.*, *Spies* v. *United States*, 317 U.S. 492, 495.

[30] The Act has since been amended by the Narcotic Addict Treatment Act of 1974 to add additional grounds for the revocation and suspension of registrations. See 88 Stat. 125 (21 U.S.C. 824(a) and (d)).

statutes (21 U.S.C. 824(a)(2)).[31] Since, under the court of appeals' holding, a practitioner's distributing other than for a legitimate medical or other professional purpose is not prohibited by the only other felony provision of the Act applicable to registrants (section 843), the effect of that holding is to make action by the Attorney General under subsection 824 (a)(2) depend upon a prior felony conviction in a state court.

Congress surely did not intend that limitation upon the Attorney General's authority. The clear implication of section 824 is that the power of the Attorney General to revoke registrations was to be complementary to, rather than to replace, prosecution of physicians under section 841 when they prescribe controlled substances for non-medical purposes. Indeed, section 824(c) expressly provides that "[revocation proceedings] shall be independent of, and not in lieu of, criminal prosecutions * * *."[32]

[31] Since, as the dissent noted (Pet. App. 40a), 2 D.C. Code 131 also requires conviction of a felony before a physician's license to practice medicine can be revoked, revocation of respondent's registration is virtually impossible under the court of appeals' decision, unless he is first tried and convicted of a felony under local narcotics laws (which, with few exceptions, provide only misdemeanor penalties in the District of Columbia) or section 843 of the Controlled Substances Act.

[32] In the article on the Controlled Substances Act by Baumgartner and Morrell, the authors note that between June 1, 1971 and January 31, 1972, BNDD suspended five practitioner registrations, and revoked two, based upon felony convictions. Baumgartner and Morrell, *supra*, 23 Syr. L. Rev. at 811–812 n. 65. They then state that "[t]he limited grounds available to BNDD to revoke or suspend a registration represent the most critical flaw in the CSA, since BNDD is left without adequate regulatory recourse against a registrant who has been issued an annual registration

B. THE LEGISLATIVE HISTORY OF THE CONTROLLED SUBSTANCES ACT MAKES CLEAR THAT CONGRESS DID NOT INTEND TO CHANGE PRIOR LAW UNDER WHICH PHYSICIANS WHO TRAFFICKED IN DRUGS WERE SUBJECT TO PROSECUTION FOR UNLAWFUL DISTRIBUTION

1. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II of which is the Controlled Substances Act, superseded the Harrison Narcotic Act of 1914, 38 Stat. 785. Under the Harrison Act, all persons who sold or prescribed certain narcotic drugs were required to register with the Secretary of the Treasury (26 U.S.C. (1964 ed.) 4722). They were prohibited from selling or prescribing drugs except to persons with order forms issued by the Secretary (26 U.S.C. (1964 ed.) 4705). The latter requirement was inapplicable, however, to "the dispensing or distribution of narcotic drugs to a patient by a physician * * * or other practitioner registered under section 4722, *in the course of his professional practice only* * * *." 26 U.S.C. (1964 ed.) 4705(c)(1) (emphasis supplied).[33]

and thereafter commits violations of various aspects of the CSA and/or its regulations which are not sufficient to warrant a felony conviction and do not constitute a material falsification of application filed for the previous issued registration." *Id.* at 811–812. If there are "violations * * * of the CSA * * * which are not sufficient to warrant a felony conviction * * *," there must also be violations of the CSA which are sufficient to warrant a felony conviction.

[33] The Harrison Narcotic Act had other exemptions for conduct by physicians and other practitioners. For example, it was unlawful to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package (26 U.S.C. (1964 ed.) 4704(a)); but this provision did not apply to any person having in his possession any narcotic drugs "which have been obtained from a registered dealer in pursuance of a written or oral prescription * * *

Congress used virtually the same language in the Controlled Substances Act to describe the conduct that is "authorized" by practitioners—namely, dispensing controlled substances "in the course of professional practice or research." See 21 U.S.C. 802(20). When Congress used such substantially identical language, it presumably was aware of and intended to adopt the settled judicial construction of the language of the Harrison Act. See *Shapiro* v. *United States,* 335 U.S. 1, 16; *Hecht* v. *Malley,* 265 U.S. 144, 152–153; *United States* v. *Kapsalis,* 313 F. 2d 875 (C.A. 7), certiorari

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issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered [under the Act] * * *." 26 U.S.C. (1964 ed.) 4704(b)(1). Nor did it apply to the dispensing or administration of narcotic drugs "to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes * * *." 26 U.S.C. (1964 ed.) 4704(b)(2). While another section of the Harrison Act made it unlawful to sell, barter, exchange or give away narcotic drugs except pursuant to a written order form, the prohibition contained therein did not apply to the sale, dispensing or distribution of such drugs by a dealer to a consumer "under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered [under the Act] * * *." 26 U.S.C. (1964 ed.) 4705(c)(2).

Similarly, the Drug Abuse Control Amendments of 1965 prohibited the manufacture or sale of "any depressant or stimulant" except, *inter alia*, by "practitioners * * * while acting in the course of their professional practice." 21 U.S.C. (Supp. V, 1964 ed.) 360(a) and (b). See also 26 U.S.C. (1964 ed.) 4742(b)(1) (the Marihuana Tax Act), creating a similar exception in the case of marihuana transfers by a "practitioner * * * in the course of his professional practice only * * *."

denied, 374 U.S. 856. That construction, therefore, is a proper basis for interpreting the new Act.

In a series of decisions under the Harrison Act, this Court held that a physician whose dispensation or prescription of drugs amounted to trafficking in drugs was not engaged "in the course of his professional practice only." In *Webb* v. *United States,* 249 U.S. 96, a physician and druggist had "conspired to sell large quantities of morphine to addicts under the guise of issuing and filling orders. The so-called prescriptions were issued without consideration of individual cases and for the quantities of drugs which applicants desired * * *" (*Linder* v. *United States,* 268 U.S. 5, 20). In holding that such conduct was not within the statutory exemption for professional practice, the Court stated (249 U.S. at 99–100): "[T]o call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."

The leading case involving a physician under the Harrison Act was *Jin Fuey Moy* v. *United States,* 254 U.S. 189. The evidence there showed a course of conduct strikingly similar to that of respondent, namely (*id.* at 192–193):

> * * * [D]efendant was a practicing physician in Pittsburgh, registered under the act so as to be allowed to dispense or distribute opium and its derivatives without a written order in official form, "in the course of his professional practice only"; that he was in the habit of issuing prescriptions for morphine sulphate without such written order and not in the ordinary

course of professional practice; that he issued them to persons not his patients and not previously known to him, professed morphine users, for the mere purpose, as the jury might find, of enabling such persons to continue the use of the drug, or to sell it to others; in some cases he made a superficial physical examination, in others none at all; his prescriptions called for large quantities of morphine—8 to 16 drams at a time—to be used "as directed," while the directions left the recipient free to use the drug virtually as he pleased. His charges were not according to the usual practice of medical men, but according to the amount of the drug prescribed, being invariably one dollar per dram. * * * At and about the dates specified in the indictment—the spring of the year 1917—and for more than two years before, the number of prescriptions issued by defendant and filled at [one particular] drug store ran into the hundreds each month, all calling for morphine sulphate or morphine tablets in large quantities.

The Court held (*id.* at 194):

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes

> protects neither the physician who issues it nor the dealer who knowingly accepts and fills it.

In *United States* v. *Behrman,* 258 U.S. 280, 287, the Court noted that *Webb* and *Jin Fuey Moy* had merely recognized that Congress' purpose in providing a statutory exception for the dispensing or prescription of drugs "in the course of * * * professional practice" by registered physicians was "to confine the distribution of these drugs to the regular and lawful course of professional practice, and that not everything called a prescription is necessarily such." And, as the Court said in *Linder* v. *United States, supra,* 268 U.S. at 18: "What constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances. *Mere pretense of such practice, of course, cannot legalize forbidden sales* * * * (emphasis supplied).[34]

[34] In *Linder*, the charge against the physician was that he had given an addict four tablets containing morphine and cocaine, "for the sole purpose of relieving conditions incident to addiction and keeping herself comfortable" (268 U.S. at 17). In reversing the conviction, the Court noted that the indictment did not "question the doctor's good faith nor the wisdom or propriety of his action according to medical standards" and did not "allege that he dispensed the drugs otherwise than to a patient in the course of his professional practice or for other than medical purposes. * * * [W]e cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to [an addict], in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction" (268 U.S. at 17–18).

Respondent's conduct in the present case, involving large-scale narcotics trafficking over several months, is a far cry from the single small transaction involved in *Linder.*

These decisions leave no doubt that respondent's activities would have violated the Harrison Act. The question is whether, although using substantially the same language in the Controlled Substances Act as in the Harrison Act, Congress nevertheless intended the general criminal provisions of the new Act to be inapplicable to such drug trafficking by physicians. The answer is negative.

2. Nothing in the legislative history of the Controlled Substances Act indicates or even suggests that Congress intended to make such a drastic change in the criminal liability of physicians whose dispensing and prescribing of drugs goes beyond legitimate professional practice. To the contrary, such a relaxation of criminal responsibility would be inconsistent with one of the purposes of the Act which was "to strengthen existing law enforcement authority in the field of drug abuse" (84 Stat. 1236, Preamble).

The major concern of the Congress in the Controlled Substances Act was not, as the court of appeals thought, to ~~insure uniform~~ treatment of registrants and non-registrants, but to alleviate the practice under the Harrison Act and related statutes to punish drug-related conduct, by whomever done, without sufficient regard to its relative gravity. Thus, in contrast to the Harrison Act, the Controlled Substances Act subjected less serious and more technical violations by registrants to civil fines or moderate criminal penal-

ties (H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. 10 (1970)). The Act also classified drugs subject to control in five schedules according to their potential for abuse and psychological and physical effects and established "penalties which are designed to correspond to violations involving substances contained in the respective schedules" (*id.* at 6). Congress also abolished all mandatory minimum sentences (a primary criticism leveled at the Harrison Act) in favor of a more flexible penalty structure giving the sentencing judge discretion (*id.* at 11), except that persons engaged in a "continuing criminal enterprise" were subjected to mandatory sentences of up to life imprisonment. 21 U.S.C. 848.

Congress thus eliminated the prior statutory practice by which differing forms of involvement with drugs were treated identically. The punishment under the Controlled Substances Act depends instead upon such factors as the danger of the drugs involved (as determined by the schedules), the intent with which the drugs are possessed or distributed and, in some instances, the age of the person to whom they are distributed (21 U.S.C. 845). See H.R. Rep. No. 91–1444, *supra,* at 10–11.

There is no indication, however, that in making these significant changes in the scope of punishment for various types of drug offenses, Congress intended to lessen or substantially alter the criminal liability of physicians who acted outside the bounds of professional practice by trafficking in narcotic drugs for

profit.[35] To the contrary, Congress was aware that "certain classes of persons, pharmacists, physicians and researchers to name a few * * * pose a great source of diversion of dangerous substances into other than legitimate channels." 116 Cong. Rec. 1663 (1970) (remarks of Senator Hruska).[36] Such persons were therefore subjected to the regulatory controls of the

[35] As the Ninth Circuit said in *United States* v. *Rosenberg*, *supra*, slip op. at 4–5:

> There is no suggestion in the legislative history that the registration provisions were intended to be a substitute for the Act's general criminal penalties. The legislative history expressly states that the Act "provides severe criminal penalties for persons engaged in illicit . . . sale of controlled drugs primarily for the profits to be derived therefrom." Since this is what Dr. Rosenberg did, the severe criminal penalties contained in section 841 were appropriately applied to him. This conclusion is buttressed by the facts that physicians were subject to the prior federal drug laws, see, e.g., Jin Fuey Moy v. United States, 254 U.S. 189 (1920), and that one of the three purposes of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (of which the Controlled Substances Act is title II) was stated in the preamble to be "to strengthen *existing* law enforcement authority in the field of drug abuse." [Emphasis added.]

[36] The House Report noted, for example, that in a recent year almost 50 percent of the 9 billion amphetamines and barbiturates produced legitimately in this country had been diverted into illicit channels. H.R. Rep. No. 91–1444, *supra*, at 7. See also Hearings on S. 1895, S. 2590, S. 2637, Narcotics Legislation, before the Subcommittee to Investigate Juvenile Deliquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 318–326, 426–429, 488–491, 554–555, 643–653, 749–750 (1969); Hearings on H.R. 11701 and H.R. 13743 and related bills, Drug Abuse Control Amendments, before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 373–382 (1970).

Act, despite vigorous objections from some professional organizations.[37] That regulation, however, did not reflect a congressional purpose to exclude them from the general penalty provision in section 841.

Congress viewed the regulatory and penal provisions of the Act as complementary. Registration, record-keeping, reporting and other administrative controls would permit the authorities to maintain close surveillance over registrants, and this surveillance in turn would deter diversion of narcotics from those in the legitimate distribution chain into illicit channels. Such regulation would also disclose potential sources of diversion and enable the authorities to keep them under surveillance and take any necessary penal action against them.[38] As Senator Hruska suggested in regard to the five schedules created by the Act, they "serve a twofold purpose": first, "to determine what regulatory controls will be applicable,"

[37] Had these classes of persons been excluded from the regulatory scheme, they would necessarily have been treated like "any person" under section 841 and be subject to the greater penalties that the court of appeals found do not apply because they are "registrants." It would be surprising, indeed, if the professional groups whose representatives testified in favor of exclusion of certain practitioners from the registration requirements—for reasons such as the need to encourage innovative research, freedom to practice medicine free of administrative burdens, *etc.*—would have been advocating *greater* penalties for practitioners than for other registrants, but such is the logical extension of the court of appeals' reasoning. See note 38, *infra*.

[38] While some persons who testified before the various committees of Congress regarding drug abuse legislation believed that physicians and pharmacists should not be required to comply with such complex registration schemes and other burden-

and second, "to plug into the penalty structure * * * for determining what type of penalty will be imposed for violations of the act." 116 Cong. Rec. 1664 (1970).

Thus, while Congress intended to revamp the existing structure of penalties for drug offenses in order to take into account "the seriousness of the offense" and "individual circumstances" (H.R. Rep. No. 91–1444, *supra,* at 11), the committee reports and floor debate contain no indication that Congress intended to differentiate among different categories of "persons engaged in illicit manufacture or sale of controlled drugs primarily for the profits to be derived therefrom" (*id.* at 10), based on whether or not they were registrants. Indeed, that distinction would run directly contrary to Congress' concern with "the widespread diversion, of * * * drugs out of legitimate channels into the illicit market" (*id.* at 6), and its awareness that a principal source of that diversion was unscrupulous practitioners.[39] As the Seventh Circuit has stated:

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some administrative requirements as those proposed, none expressed doubt that such persons should be—and were in fact—subject to felony prosecution in appropriate circumstances. For example, Dr. William S. Apple, Executive Director of the American Pharmaceutical Association, stated that his group "favors and will support vigorous prosecution of anyone, including pharmacists, responsible for criminal diversion of drugs from legitimate to illicit uses." Hearings on H.R. 11701 and H.R. 13743, Drug Abuse Control Amendments, *supra*, note 36, at 363. See also *id.* at 373–375, 378.

[39] That unscrupulous practitioners were a primary source of the diversion of controlled substances—particularly methadone—into the illicit market in the District of Columbia is also the subject of a recent article. See Greene, Brown and DuPont, *Controlling the Abuse of Illicit Methadone in Washington, D.C.*, 32 Arch. Gen. Psychiatry 221 (1975). The article reported that addicts entering the District of Columbia's Narcotics Treatment Administration methadone program were asked to complete questionnaires that inquired, *inter alia*, about the origin of the methadone they had purchased in the streets. In the first quarter of 1972—while respondent was still in business—32 percent of those interviewed reported that their illicit methadone was originally obtained from a private physician. By the fourth quarter of 1973, however, the figure had declined to 4 percent. *Id.* at 224. The authors attributed this decline, *inter alia*, to "eliminating the use of methadone by physicians in the private sector who were not providing the close supervision and the many ancillary services required for effective addiction treatment * * *. *The conviction and imprisonment of the worst offender among these physicians was a major deterrent to his associates' methadone prescribing.* This channel of diversion was finally sealed when the local medical and pharmaceutical professional societies voluntarily agreed to discontinue the use of methadone, making the treatment program [of the Narcotics Treatment Administration] the only legitmate source of the drug." *Id.* at 225 (emphasis supplied).

> The language in the legislative history relied on by the *Moore* court to conclude that physicians were not to be included within the coverage of section 841 is in our view too general to justify that conclusion. The congressional purpose behind section 841 was to get the drug dealer no matter who he might be, and to prevent diversion of legitimately produced controlled substances into illicit channels. One of the major sources of this illicit diversion is from registrants who have relatively easy access to controlled substances. Certainly Congress did not intend to immunize such individuals from prosecution under section 841. *United States* v. *Green, supra,* slip op. at 13; footnote omitted.]

475-425—75——4

As we have shown, the language, the statutory scheme and the legislative history of the Controlled Substances Act make clear that physicians who traffic in narcotic drugs are subject to prosecution and conviction for unlawful distribution under section 841 (a) of the Act. It is therefore not surprising that every circuit that has considered this question, other than the District of Columbia Circuit in the instant case, has concluded that physicians are not immune from prosecution under that section. See *United States* v. *Badia,* 490 F. 2d 296 (C.A. 1); *United States* v. *Collier,* 478 F. 2d 268 (C.A. 5); *United States* v. *Leigh,* 487 F. 2d 206 (C.A. 5); *United States* v. *Green,* C.A. 7, No. 74–1428, *et al.,* decided February 27, 1975; *United States* v. *Rosenberg,* C.A. 9, No. 74–2197, decided March 31, 1975; *United States* v. *Bartee,* 479 F. 2d 484 (C.A. 10); *United States* v. *Jobe,* 487 F. 2d 268 (C.A. 10); cf. *United States* v. *Larson,* 507 F. 2d 385 (C.A. 9). Two of those decisions (*Green* and *Rosenberg*) explicitly rejected the District of Columbia Circuit's analysis of the Controlled Substances Act in the instant case. For, as the Seventh Circuit succinctly put it:

> * * * When * * * a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances his conduct should be treated like that of any street-corner pill-pusher. [*United States* v. *Green, supra,* slip op. at 9].

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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MAY 1975.

APPENDIX

Selected Provisions of the Controlled Substances Act, Pub. L. 91–513, 84 Stat. 1242, *et seq.* (21 U.S.C. 801 to 904)

SEC. 802. DEFINITIONS.—As used in this subchapter:

* * * * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

* * * * *

(20) The term "practitioner" means a physician dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

* * * * *

(27) The term "maintenance treatment" means the dispensing, for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs. [Added May 14, 1974, Public Law 93–281, § 2, 88 Stat. 124.]

(28) The term "detoxification treatment" means the dispensing, for a period not in excess of twenty-one days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period. [Added May 14, 1974, Public Law 93–281, § 2, 88 Stat. 124.]

* * * * *

SEC. 812. SCHEDULES OF CONTROLLED SUBSTANCES—ESTABLISHMENT.

* * * * *

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules

established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

* * * * *

(2) SCHEDULE II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe phychological or physical dependence.

* * * * *

(c) Initial schedules of controlled substances.

Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

* * * * *

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.

(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone - Intermediate, 4 - cyano - 2 - dimethylamino-4,4-diphenyl butane.
(13) Moramide - Intermediate, 2 - methyl - 3 - morpholino-1,1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4 - cyano - 1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

* * * * *

SEC. 821. RULES AND REGULATIONS.—The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances.

SEC. 822. PERSONS REQUIRED TO REGISTER.—

(a) Annual registration.—Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the At-

torney General in accordance with the rules and regulations promulgated by him.

(b) Authorized activities.—Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

(c) Exceptions.—The following persons shall not be required to register and may lawfully possess any controlled substance under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance is in the usual course of his business or employment.

(3) An ultimate user who possesses such substance for a purpose specified in section 802 (25) of this title.

(d) Waiver.—The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.

(e) Separate registration.—A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

(f) Inspection.—The Attorney General is authorized to inspect the establishment of a registrant or

applicant for registration in accordance with the rules and regulations promulgated by him.

SEC. 823. REGISTRATION REQUIREMENTS—MANUFACTURERS OF CONTROLLED SUBSTANCES IN SCHEDULES I AND II.

(a) The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

(b) The Attorney General shall register an applicant to distribute a controlled substance in schedule I or II unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;
(2) compliance with applicable State and local law;
(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;
(4) past experience in the distribution of controlled substances; and
(5) such other factors as may be relevant to and consistent with the public health and safety.

(c) Registration granted under subsections (a) and (b) of this section shall not entitle a registrant to (1) manufacture or distribute controlled substances in schedule I or II other than those specified in the registration, or (2) manufacture any quantity of those controlled substances in excess of the quota assigned pursuant to section 826 of this title.

(d) The Attorney General shall register an applicant to manufacture controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule III, IV, or V compounded therefrom into other than legitimate medical, scientific, or industrial channels;
(2) compliance with applicable State and local law;
(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;
(4) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;
(5) past experience in the manufacture, distribution, and dispensing of controlled substances, and the existence in the establishment of effective controls against diversion; and
(6) such other factors as may be relevant to and consistent with the public health and safety.

(e) The Attorney General shall register an applicant to distribute controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;
(2) compliance with applicable State and local law;
(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

(f) Practitioners shall be registered to dispense or conduct research with controlled substances in schedule II, III, IV, or V if they are authorized to dispense or conduct research under the law of the State in which they practice. Separate registration under this part for practitioners engaging in research with nonnarcotic controlled substances in schedule II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Pharmacies (as distinguished from pharmacists) when engaged in commercial activities, shall be registered to dispense controlled substances in schedule II, III, IV, or V if they are authorized to dispense under the law of the State in which they regularly conduct business. Registration application by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of the each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 824(a) of this title.

(g) Practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose. The Attorney General shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment (or both)

(1) if the applicant is a practitioner who is determined by the Secretary to be qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought;

(2) if the Attorney General determines that the applicant will comply with standards established by the Attorney General respecting (A) security of stocks of narcotic drugs for such treatment, and (B) the maintenance of records (in accordance with section 827 of this title) on such drugs; and

(3) if the Secretary determines that the applicant will comply with standards established by the Secretary (after consultation with the Attorney General) respecting the quantities of narcotic drugs which may be provided for unsupervised use by individuals in such treatment. [Added May 14, 1974, Pub. L. 93–281, § 3, 88 Stat. 124.]

SEC. 824. DENIAL, REVOCATION, OR SUSPENSION OF REGISTRATIONS.—

(a) Grounds.—A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

(1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any

State, relating to any substance defined in this subchapter as a controlled substance; or

(3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances.

A registration pursuant to section 823(g) of this title to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 823(g) of this title. [As amended, May 14, 1974, Pub. L. 93–281, § 4, 88 Stat. 125.]

(b) Limits of revocation or suspension.—The Attorney General may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Service of show cause order; proceedings.—Before taking action pursuant to this section, or pursuant to a denial of registration under section 823 of this title, the Attorney General shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of Title 5. Such proceedings shall be independent of, and not in lieu of,

criminal prosecutions or other proceedings under this subchapter or any other law of the United States.

(d) Suspension of registration in cases of imminent danger.—The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety. A failure to comply with a standard referred to in section 823(g) of this title may be treated under this subsection as grounds for immediate suspension of a registration granted under such section. A suspension under this subsection shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction. [As amended, May 14, 1974, Pub. L. 93–281, § 4, 88 Stat. 125.]

* * * * *

SEC. 827. RECORDS AND REPORTS OF REGISTRANTS—INVENTORY.

(a) Except as provided in subsection (c) of this section—

(1) every registrant under this subchapter shall, on the effective date of this section, or as soon thereafter as such registrant first engages in the manufacture, distribution, or dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand, except that the regulations prescribed under this section shall permit each such biennial inventory (following the initial inventory required by this paragraph) to be prepared on such registrant's regular general physical inventory date (if any) which is nearest to and does not vary by more

475-425—75——5

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than six months from the biennial date that would otherwise apply;

(2) on the effective date of each regulation of the Attorney General controlling a substance that immediately prior to such date was not a controlled substance, each registrant under this subchapter manufacturing, distributing, or dispensing such substance shall make a complete and accurate record of all stocks thereof on hand; and

(3) on and after the effective date of this section, every registrant under this subchapter manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

(b) Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of nonnarcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

(c) The foregoing provisions of this section shall not apply—

(1)(A) with respect to any narcotic controlled substance in schedule II, III, IV, or V, to the prescribing or administering of such substance by a practitioner in the lawful course of his professional practice unless such substance was prescribed or administered in the course of maintenance treatment or detoxification treatment of an individual [as amended, May 14, 1974, Pub. L. 93–281, § 5, 88 Stat. 125]; or

(B) with respect to nonnarcotic controlled substances in schedule II, III, IV, or V, to any practitioner who dispenses such substances to his patients, unless the practitioner is regularly engaged in charging his patients, either separately or together with charges for other professional services, for substances so dispensed [as amended, May 14, 1974, Pub. L. 93–281, § 5, 88 Stat. 125];

(2) (A) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in research conducted in conformity with an exemption granted under section 355(i) or 360b(j) of this title;

(B) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in preclinical research or in teaching; or

(3) to the extent of any exemption granted to any person, with respect to all or part of such provisions, by the Attorney General by or pursuant to regulation on the basis of a finding that the application of such provisions (or part thereof) to such person is not necessary for carrying out the purposes of this subchapter.

(d) Every manufacturer registered under section 823 of this title shall, at such time or times and in such form as the Attorney General may require, make periodic reports to the Attorney General of every sale, delivery, or other disposal by him of any controlled substance, and each distributor shall make such reports with respect to narcotic controlled substances,

identifying by the registration number assigned under this subchapter the person or establishment (unless exempt from registration under section 822(d) of this title) to whom such sale, delivery, or other disposal was made.

* * * * *

SEC. 828. ORDER FORMS.

(a) Unlawful distribution of controlled substances.—It shall be unlawful for any person to distribute a controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) of this section and regulations prescribed by him pursuant to this section.

* * * * *

(d) Issuance.

(1) The Attorney General shall issue forms pursuant to subsections (a) and (c)(2) of this section only to persons validly registered under section 823 of this title (or exempted from registration under section 822(d) of this title). Whenever any such form is issued to a person, the Attorney General shall, before delivery thereof, insert therein the name of such person, and it shall be unlawful for any other person (A) to use such form for the purpose of obtaining controlled substances or (B) to furnish such form to any person with intent thereby to procure the distribution of such substances.

(2) The Attorney General may charge reasonable fees for the issuance of such forms in such amounts as he may prescribe for the purpose of covering the cost to the United States of issuing such forms, and other necessary activities in connection therewith.

(e) Unlawful acts.—It shall be unlawful for any person to obtain by means of order forms issued under this section controlled substances for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or in the course of his professional practice or research.

SEC. 829. PRESCRIPTIONS.

(a) Schedule II substances.—Except when dispensed directly by a practitioner other than a pharmacist, to an ultimate user, no controlled substance in scedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 353(b) of this title. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

* * * * *

SEC. 841. PROHIBITED ACTS A.

(a) Unlawful acts.—Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties.—Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimu-

lant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

* * * * *

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

* * * * *

SEC. 842. PROHIBITED ACTS B.

(a) Unlawful acts.—It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 825 of this title;

(4) to remove, alter, or obliterate a symbol or label required by section 825 of this title;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration,

order or order form, statement, invoice, or information, required under this subchapter or subchapter II of this chapter;

(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824(f) or 881 of this title or to remove or dispose of substances so placed under seal; or

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection.

(b) Manufacture.—It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is—

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or

(2) in excess of a quota assigned him pursuant to section 826 of this title.

(c) Penalties.

(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution

and laws of the United States) shall have jurisdiction in accordance with section 1355 of Title 28 to enforce this paragraph.

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

Sec. 843. Prohibited Acts C.

(a) Unlawful Acts.—It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) Communication facility.—It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communications.

(c) Penalties.—Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits

such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

* * * * *

SEC. 845. DISTRIBUTION TO PERSONS UNDER AGE TWENTY-ONE.

(a) Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule.

(b) Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 333(b) of this title as in effect prior to the first day of the seventh calendar month that begins after October 26, 1970) have become final, is punishable by (1) a term of imprisonment, or a fine, or both, up to three times that authorized by section 841(b) of this title,

and (2) at least three times any special parole term authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule.

* * * * *

SEC. 848. CONTINUING CRIMINAL ENTERPRISE—PENALTIES; FORFEITURES.

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24–203 to 24–207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

* * * * *

Regulation

21 C.F.R. 306.04 PURPOSE OF ISSUE OF PRESCRIPTION

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting

to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

(c) A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs, in the course of conducting an authorized clinical investigation in the development of a narcotic addict rehabilitation program.

* * * * *

26 U.S.C. (1964 ed.) 4701, *et seq.* (The Harrison Narcotic Act of 1914)

* * * * *

SEC. 4704. Packages.

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prime facie evidence of a violation of this subsection by the person in whose possession the same may be found.

(b) Exceptions in case of registered practitioners.—

The provisions of subsection (a) shall not apply—

(1) Prescriptions.

To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705 (c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722; and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, and name and address of the patient, serial number of prescription, and name, address, and registry number of the person issuing said prescription; or

(2) Dispensations direct to patients.

To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

SEC. 4705. Order forms.

(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

(c) Other exceptions.—Nothing contained in this section, section 4735, or section 4774 shall apply—

(1) Use of drugs in professional practice. To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only * * *

* * * * *

SEC. 4722. Registration.

On or before July 1 of each year every person who engages in any of the activities enumerated in section 4721 shall register with the Secretary or his delegate his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-759

UNITED STATES OF AMERICA, *Petitioner*

v.

THOMAS W. MOORE, JR.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	2
Summary of Argument	6
Argument	8
The Statute in Question Does Not Proscribe the Respondent's Conduct	8
Violation of Section 306.04 of the Regulations Promulgated by the Attorney General Cannot Trigger Prosecution Under Section 841 of the Statute	12
No Violation of the Regulation Was Proven	17
The Harrison Narcotic Act Cases	19
The Cases From Other Circuits	23
Conclusion	26

TABLE OF AUTHORITIES

CASES:

Bell v. United States, 349 U.S. 81 (1955)	16
Bulova Watch Co. v. United States, 365 U.S. 753 (1961)	16
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957)	16
Ginsburg & Sons v. Popkin, 285 U.S. 204 (1932)	16
Jin Fuey Moy v. United States, 254 U.S. 189 (1920)	21

Page

Jordan v. United States District Court for the District of Columbia, 233 F.2d 362 (D.C. Cir. 1956) .. 6
Linder v. United States, 268 U.S. 5 (1925) 20
Singer v. United States, 323 U.S. 338 (1945) 15
United States v. Badia, 490 F.2d 296 (1st Cir. 1973) 23, 24, 26
United States v. Bartee, 479 F.2d 484 (10th Cir. 1973) 23, 24
United States v. Behrman, 258 U.S. 280 (1921) 21
United States v. Collier, 478 F.2d 268 (5th Cir. 1973) 23
United States v. Eaton, 144 U.S. 677 (1892) 15
United States v. Green, 511 F.2d 1062 (7th Cir. 1975) 23, 25
United States v. Grimaud, 220 U.S. 506 (1911) 15
United States v. Jobe, 487 F.2d 268 (10th Cir. 1973) 23, 24, 26
United States v. Larson, 407 F.2d 385 (9th Cir. 1974) .23, 24
United States v. Leigh, 487 F.2d 206 (5th Cir. 1973) ..23, 24
United States v. Romero, 249 F.2d 371 (2d Cir. 1957) 6
United States v. Rosenberg, — F.2d —, No. 74-2197 (9th Cir. 1975) 20, 23, 24, 25
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) 26
Viereck v. United States, 318 U.S. 236 (1943) 15

STATUTES:

18 U.S.C. § 3148 4

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 54 Stat. 1242 (Controlled Substances Act), 21 U.S.C. §§ 801-904:

§ 821 .....7, 14
§ 822 8
§ 822(a) 8
§ 822(b) 8
§ 822(c)-(f) 8, 10
§ 823(f) 11
§ 824 12
§ 829 16
§ 841 .....2 *passim*
§ 842 .....7, 10, 12, 16

Page

§ 842(c)(1) 10
§ 842(c)(2)(A) 10
§ 842(c)(2)(B) 10
§ 843 .....7, 10, 12
§ 843(c) 10
§ 845 3
§ 871(b) 7, 14

Harrison Narcotic Act of 1914, 38 Stat. 785, 26 U.S.C. § 4701, *et seq.* 19, 20

Narcotic Addict Treatment Act of 1974, Pub. L. 93-281 11

28 U.S.C. § 1254(1) 1

D.C. Code § 2-131 4

REGULATIONS:

21 C.F.R. § 306.01 16
306.03 19
306.04 .....2 *passim*
306.04(a) 7
306.04(c) 7

MISCELLANEOUS:

New Perspectives on Urban Crime, American Bar Association Special Committee on Crime Prevention and Control (1972) 18

Treaties in Force, U. S. Department of State (1974) 3

H.R. No. 91-1444, 91st Cong., 2d Sess., U. S. Cong. & Adm. News (1970) 9, 20

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals is reported at 505 F.2d 426.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974. On November 14, 1974, the Chief Justice extended the government's time for filing a petition for a writ of certiorari to and including December 17, 1974. The petition was filed on the latter date and granted on February 18, 1975 (App. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a physician who is registered with the Bureau of Narcotics and Dangerous Drugs ("BNDD") and whose registration authorizes him to prescribe methadone may be prosecuted under 21 U.S.C. § 841 for prescribing methadone to his patients.

Subsidiary questions encompassed within the main question are:

(a) Whether a violation by such a physician of Section 306.04 of Regulations promulgated pursuant to the Controlled Substance Act (21 C.F.R. § 306.04) may be prosecuted under Section 841 of the Act.

(b) Whether, in the circumstances of this case, Section 306.04 was, in fact, violated.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Controlled Substances Act (Pub. L. 91-513, 84 Stat. 1242, 21 U.S.C. 801, et seq.), relevant sections of other statutes and the pertinent regulation, 21 C.F.R. 306.04 (1973 ed.), are set forth in the appendix to the government's brief. They are reproduced, where appropriate, throughout this brief.

STATEMENT

The respondent, Dr. Thomas W. Moore, then a practicing physician in the District of Columbia, was indicted on June 27, 1972 on 639 counts of violating 21 U.S.C. § 841(a).[1] App. 3-29. The indictment alleged

[1] "(a) Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

the unlawful distribution of a controlled substance, *i.e.*, methadone, to named recipients on specific dates. He was tried in October 1972 on an indictment which contained 40 of the original counts, the remaining counts having been severed. 505 F.2d, at 428, fn. 7. He was convicted on 22 of those counts, eight of which were said to involve persons under 18. Pursuant to 21 U.S.C. § 845, distribution to minors may carry a doubled sentence.[2]

After conviction, and prior to the date set for sentence, Dr. Moore left the country and travelled first to Canada and thence to Morocco, Algeria, Switzerland and, finally, to Denmark. He returned voluntarily[3] and was arrested immediately upon his return. The trial court imposed concurrent sentences of five to fifteen years on 14 of the 22 counts. On the other eight counts, said to relate to minors, the trial court imposed sentences of ten to thirty years, concurrent among themselves but consecutive to the sentences imposed on the other 14 counts. In addition, fines totalling $150,000 were imposed. The remaining counts were dismissed. App. 134. He thus faces a 15 to 45 year jail sentence and a massive fine. 505 F.2d, at 429;

[2] "(a) Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule."

[3] Denmark then had no extradition treaty with the United States. *Treaties in Force,* U.S. Department of State (1974), pp. 66-70.

App. 134.[4] He was ordered jailed immediately, *id.*, and has been continually incarcerated since that time.[5]

Respondent's view of the manner in which the statute in question must be interpreted, and the inapplicability of certain regulations promulgated thereunder, does not require a lengthy summary of the evidence introduced at trial. The following facts, which the jury could have found, were conceded in the court of appeals, 505 F.2d, at 427-428, fn. 6, and are similarly conceded here. With respect to patients named in the indictment, as well as others during the indictment period, including government agents posing as patients, Dr. Moore conducted himself more or less as follows:

> 1. He did not take all possible precaution to assure himself that the patients for whom he was prescribing methadone were in fact narcotic addicts. Some, in fact, were not.
>
> 2. He did not take all possible precaution to ascertain that the methadone he was prescribing was, in fact, being consumed by the patients for whom he prescribed it. In some instances they delivered that methadone to others.

[4] In addition, his license to practice medicine was revoked pursuant to the provisions of D.C. Code § 2-131. That statute authorizes such revocation upon the conviction "of any felony."

[5] The court of appeals denied a motion seeking the Respondent's release from custody by an order dated December 13, 1974. Five days later the order was amended to state that "there are no conditions of release under 18 U.S.C. § 3148 which 'will reasonably assure that the [appellant] will not flee.'" This Court denied Respondent's application for release on December 23, 1974. A-446.

> 3. He was careless in record-keeping, failing in some instances to record the quantity of methadone he had prescribed for his patient.
>
> 4. He prescribed methadone in quantities larger than the government's medical witnesses thought proper for detoxification, sometimes in whatever quantities the patients requested.
>
> 5. His fees were graduated not in accord with the medical services rendered but in accord with the quantity of methadone prescribed.[6]

Dr. Moore's trial testimony was that his purpose in prescribing methadone for his patients was to cure them of drug addiction. His theory, the inspiration for which he attributed chiefly to the experience of a British practitioner about which he had read in the medical literature, was that cure depended upon methadone in such large quantities, varying from case to case, as might be required to achieve in the patient two conditions: (1) a physical condition of "blockade";[7] and (2) a psychological condition of strong desire for drug detoxification. According to that theory, if only enough methadone to achieve the first condition were taken, the subsequent detoxification by

[6] As for his fee schedule, Dr. Moore's explanation at trial was that his purpose in charging more for prescriptions of higher quantities was to make it uneconomical for his patients to peddle their methadone in the black market and to make sure they consumed it themselves.

[7] "Blockade," according to an expert called by the defense, "means that you stuff a patient up with enough methadone so that the heroin he takes doesn't have any place to go but straight in and out. . . . I mean, whatever heroin did for the brain, it no longer does it at a certain X-level of methadone." Tr., 10/18/72, pp. 554-55.

gradual diminutions of dosage would produce only temporary remission of the addiction. To achieve cure, however, the methadone dosage must be continued beyond "blockade," until the second condition has been achieved—in which the counter-craving for detoxification substitutes for the drug-craving. It was upon this theory that Dr. Moore justified his practice of allowing his patients' desire to determine the quantity of methadone he prescribed for them.

Respondent's view is that neither the statute in question nor the regulations in effect at the time of the Respondent's conduct made his conduct criminal. As a result thereof, an acquittal is required. This is the result reached by the court below.[8]

SUMMARY OF ARGUMENT

The statute allegedly violated by Dr. Moore, 21 U.S.C. § 841, makes it a felony for a person not "au-

[8] Even should this Court disagree with the statutory and regulatory analysis contained in the opinion of the court below, the case must be remanded to that court for consideration of points there raised but not reached, including, *inter alia*, whether the doubled sentence was proper.

Even the dissenting judge in the court below recognized that, since the minority status of the eight persons named in the counts as to which the sentence was doubled was neither alleged (as in *United States* v. *Romero*, 249 F.2d 371, 372 (2d Cir. 1957)) nor proven, nor was a special verdict had thereon, the increased sentences called for by 21 U.S.C. § 845 were improperly imposed. 505 F.2d, at 458. This conclusion is compelled by *Jordan* v. *United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956). Unlike the dissenting judge, however, who would not disturb the consecutive nature of the sentences, the Respondent's view is that not only may such increased sentences not be imposed, but, by the same token, the sentences on those counts could not properly be made consecutive to the sentences imposed on the other counts. The prevailing opinion did not reach the issue of sentencing.

thorized by this subchapter", 21 U.S.C. §§ 801-904, to dispense methadone. The statutory scheme, with respect to "authorized" persons (*i.e.*, manufacturers, wholesalers, physicians and pharmacists), is to require them to register annually with the Department of Justice and to submit to a system of administrative control and regulation, 21 U.S.C. §§ 821 *et seq.* The penal sanctions for misconduct by such registrants are those provided in Sections 842 and 843. By contrast, the severe penal sanctions of Section 841 are reserved for those *unauthorized* persons who deal in narcotics outside the regulatory system.

The government, although conceding that Dr. Moore was registered with the Department of Justice to prescribe methadone during the indictment period, successfully contended that he was nevertheless amenable to prosecution under Section 841, because he had violated some aspects of Section 306.04(a) and (c) of the regulations promulgated by the Attorney General under the statute. However, a violation of the regulation cannot be prosecuted as a crime under Section 841 because: (1) although the statute authorizes regulations to be promulgated, 21 U.S.C. §§ 821, 871(b), it does not apply any criminal sanctions to their violation; and (2) if any statutory sanctions were applicable to a violation of the regulation here involved, it would be the lesser sanction of Section 842, rather than the harsh penalties of Section 841.

Moreover, the government proved no violation of the regulation, so that, whatever the government's theory, the trial court should have granted acquittal on all counts.

ARGUMENT

The Statute in Question Does No. Proscribe the Respondent's Conduct

21 U.S.C. § 841 provides, in pertinent part:

> "Except as authorized by this sub-chapter, it shall be unlawful for any person . . .
>
> 1) to . . . distribute . . . a controlled substance; . . . ."

That is precisely what each count of the Indictment charged—that "Thomas W. Moore, Jr. . . . distribute[d] . . . a controlled substance [to certain named persons] . . . ". App. 3, *et seq.* The fatal flaw in the government's case is found in the provisions of 21 U.S.C. § 822(b).[9] That section provides, in pertinent part:

> "Persons registered by the Attorney General . . . to . . . dispense controlled substances are authorized to . . . dispense such substances . . . ."

[9] "Sec. 822.

> "(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.
>
> "(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

Subsequent subsections provide exceptions to the registration requirements (Section 822(c)), provide for waiver of such requirements (Section 822(d)), require separate registration for each establishment (Section 822(e)) and authorize inspections (Section 822(f)).

Dr. Moore was registered by the Attorney General, a fact which was, and is, conceded by the government. App. 36; Pet. Br., p. 2. In a statement to the trial court, the Assistant United States Attorney presenting the case made the following concession:

> "He still retained during the time of the dates in the indictment until the present date his registration with BNDD authorizing him to give out prescriptions." App. 36.

Dr. Moore had, therefore, been congressionally exempted from felony prosecution under Section 841.

This result does not arise from a congressional oversight. It is part of a carefully devised statutory scheme which purposefully divided the drug universe into those registered (and, thus approved) to handle narcotic substances and those not registered and which dealt differently with each group.

The House Committee on Interstate and Foreign Commerce, in reporting out the bill which became the Controlled Substances Act, began its analysis of the legislation by pointing out the divergence of treatment of those authorized to deal in narcotics and those not so authorized:

> "The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." House Report No. 91-1444. 91st Cong., 2d Sess., Sept. 10, 1970, U.S. Code Cong. and Adm. News (1970), p. 4569.

Thus, with regard to those recognized as having a legitimate function to perform in dealing with narcotics,

the manufacturer, the retailer, the physician, etc., the intent of Congress was to subject them to administrative regulation and control. The penal sanctions applicable to misconduct by such "authorized" persons within the system of administrative regulation and control were specified in 21 U.S.C. §§ 842 and 843.[10] The use of Section 841's more severe penal sanctions was reserved for *unauthorized* persons—those who dealt in narcotics "outside the legitimate distribution chain . . . ".

To effectuate its intent in respect of persons in the "legitimate distribution chain", Congress provided in Section 822(a) that they must register annually with the Department of Justice; and, in Section 822(b), that, having so registered, they were "authorized" to deal with narcotics to the extent of their registration. To effectuate the system of administrative controls over registered doctors, Congress authorized the Attorney General to conduct inspections of their offices. 21 U.S.C. § 822(f). The registered doctor, whose reg-

[10] The text of Sections 842 and 843 is found in Pet. Br., 19a-23a. In short, Section 842 makes it unlawful for any person who is a registrant to distribute a controlled substance without a prescription, to distribute a controlled substance "not authorized by his registration", to distribute such a substance improperly labelled or on which the label has been obscured, to fail to keep records and make reports when required, to refuse entry into his premises. The basic penalty is a $25,000 civil penalty, Section 842(c)(1), with a one year prison sentence for violations "committed knowingly", Section 842(c)(2)(A), and two years and $50,000 for a second offender. Section 842(c)(2)(B).

Similarly, Section 843 proscribes one "who is a registrant" from distributing a controlled substance other than by an approved order form, from using a fictitious or revoked "registration number", from acquiring registration by fraud or misrepresentation, from making false reports. The basic penalty is four years and $30,000. Section 843(c).

istration was granted in the first instance on a finding that he possessed a medical license authorizing him to dispense narcotic drugs (see 21 U.S.C. § 823(f)), thus operates under the vigilant eye of the Bureau of Narcotics and Dangerous Drugs. The doctor knows that any significant misconduct the Bureau detects may trigger a revocation of his license to practice medicine. In this regard, the recently enacted Narcotic Addict Treatment Act of 1974 ("NATA"), Pub. Law 93-281, has significantly enhanced the government's ability to deregister or to suspend the registration of violators. Section 4 of NATA reads:

> "Sec. 4. (a) Section 304(a) of the Controlled Substances Act (21 U.S.C. 824(a)) is amended by adding after and below paragraph (3) the following: 'A registration pursuant to section 303(g) to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 303(g).'
>
> (b) Section 304(d) of such Act is amended (1) by inserting after the first sentence the following: 'A failure to comply with a standard referred to in section 3003(g) may be treated under this subsection as grounds for immediate suspension of a registration granted under such section.'; and (2) by striking out 'Such suspension' and inserting in lieu thereof 'A suspension under this subsection'."

By contrast, as noted by the court of appeals, Section 841, the section under which Dr. Moore was prosecuted, does not speak of registrants. 505 F.2d, at 430. In deals more firmly with those outside "the legitimate distribution chain"—the "pusher". As concluded by the court of appeals, this statutory outline "strongly

suggests that Congress intended to deal with registrants through a system of administrative controls", *id.*, relying on less severe penalty provisions and deregistration to enforce such controls.

This does not mean that persons so authorized are immune from control or punishment. Administratively, they are subject to the provisions of 21 U.S.C. § 824, which provides for deregistration following which, if their conduct continued, they would be subject to prosecution under Section 841. Moreover, they are subject to the not insubstantial civil and criminal penalties contained in Sections 842 and 843;[11] but not, so long as their registration remained intact, to the more substantial penalties in Section 841.

Violation of Section 306.04 of the Regulations Promulgated by the Attorney General Cannot Trigger Prosecution Under Section 841 of the Statute.

Notwithstanding the foregoing demonstration that Dr. Moore, as an "authorized" person, could not be prosecuted under Section 841, but must be dealt with, if at all, under the administrative provisions of the Act or under those penal provisions which specifically apply to misconduct within the administrative system (Sections 842, 843), the government saw fit to prosecute under Section 841 and, in so doing, led the trial court into error.

Before trial, at the request of the court, the prosecution made a statement of its theory of the case, as to which the court, with the prosecution's assent, declared:

> "I will take that statement which you made, Mr. Alto [Assistant United States Attorney], in the nature of a Bill of Particulars and limit your proof accordingly, and it will be of notice to Mr. Brown [defense counsel]." App. 37.

[11] See fn. 10, *supra*.

The prosecutor's statement was:

> "Of course, we have the Controlled Substance Act statute dealing with these regulations. We have exceptions within that statute as it applies to particular scientists. One of the scientists is, of course, a medical doctor, who can, if he is registered with the appropriate federal agency, dispense the controlled drugs within the course of his professional practice.
>
> The statute also provides that the Attorney General of the United States has the authority to promulgate rules and regulations governing these registrations.
>
> * * *
>
> [Dr. Moore] still retained during the time of the dates in the indictment until the present date his registration with BNDD authorizing him to give out prescriptions.
>
> Now, with respect to the regulation that governs the registration or scope of the registration that he had, I refer your Honor to the Attorney General's rules and regulations cited in the Federal Register, Volume 36, Number 80, dated April 24, 1971, Part II. On Page 7799 the regulations go into the governing rules with respect to prescriptions. And, the Government would rely on the Section numbered 306.04. And, the two main sections or the two main parts of that section that apply to this case, that is, the specified theories of the Government's case, is section (a) which states in part: 'A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner, acting in the usual course of his professional practice.'

It is the Government's contention and theory that the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and secondly, that he was not acting in the usual course of his professional practice.

The second aspect of that regulation is part (c), which states in part: 'A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the purposes of continuing his dependence upon such drugs.'

It is the Government's contention that these prescriptions were issued to maintain these drug addicts as drug addicts, and that he was not issuing these prescriptions to detoxify them, but retaining them as drug addicts.

So, that really all boils down to the end result of what I stated, that he was conducting methadone maintenance or maintaining drug addicts rather than detoxifying them as he was only authorized to do by his regulations, and by his violation of these regulations he violated 841(a) of the CSA [Controlled Substances Act]." App. 35-37.

Thus, the basic theory of the prosecution was that, although Dr. Moore may have been an "authorized" person within the meaning of Section 841, "by his violation of these regulations he violated 841(a) of the CSA." App. 37.

A fatal flaw in this theory, however, is the fact that the Congress did not attach criminal penalties to Regulation 306.04. Regulations are authorized both by Section 821 and 871(b) of the statute.[12]

[12] § 821.

"The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances."

§ 871(b).

"The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter."

But, while Congress conferred upon the Attorney General the power to promulgate regulations, it did not, in Section 841 or anywhere else in the statute, make violation of those regulations a crime. To the extent, therefore, that the conviction is said to rest on violations of Regulation 306.04, it cannot stand because, whatever administrative consequences may flow from such violations, no pronouncement of law has been violated to which Congress has attached any criminal penalty. *United States* v. *Eaton,* 144 U.S. 677 (1892); compare *United States* v. *Grimaud,* 220 U.S. 506 (1911); and see the dissenting opinion of Mr. Justice Frankfurter in *Singer* v. *United States,* 323 U.S. 338, 350-51 (1945). As this Court said in *Viereck* v. *United States,* 318 U.S. 236, 241 (1943):

> "One may be subjected to punishment for crime in the federal courts only for commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

Here, while the government can claim that the regulation has legislative authority, it cannot establish the second part of the proposition: that punishment for violating the regulation has been authorized by Congress.[13]

[13] The court of appeals did not reach this issue. 505 F.2d, at 430, fn. 14:

"We need not and do not decide whether § 306.04 of the regulations is sufficiently specific for the invocation of criminal sanctions, nor whether Congress intended that violations of regulations trigger criminal prosecutions under the Controlled substances Act."

Even if the Court could ignore the absence of any statutory nexus between the regulation violated and the penalty sought to be applied, it could not sustain application of the Section 841 penalty. Regulation 306.04 is included within Part 306 of the Regulation, the scope of which is stated in Section 306.01:

> "Rules governing the issuance, filling and filing of prescriptions pursuant to . . . (21 U.S.C. 829) are set forth generally in that section and specifically by the sections of this part."

Section 306.04 of the Regulations, therefore, whatever its provision may be taken to mean, is no more than a specification of the general provisions of Section 829 of the statute. Logically, there can be no penalty for violation of that regulation greater than the penalty prescribed for violation of the statutory provisions it implements. The penalty for violation of Section 829 is specified in Section 842, *not* Section 841, and it ranges between a mere civil money penalty and a maximum criminal penalty of one year imprisonment plus a fine. There is not even a statutory ambiguity suggesting that the government is free, by electing to prosecute the violation under Section 841, to multiply the maximum penalty for a violation of Section 829 by a factor of fifteen or thirty, as was done here. Moreover, even if there were some ambiguity as to which of the two penal sections—Section 841 or Section 842—applied to a violation of Section 829, that ambiguity would have to be resolved in favor of Section 842, because (1) it is the more specific statutory provision, *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-29 (1957); *Ginsburg & Sons* v. *Popkin,* 285 U.S. 204 (1932); and (2) it provides the lesser penalty. *Bell* v. *United States,* 349 U.S. 81, 83 (1955).

No Violation of the Regulation Was Proven.

The portions of Regulation 306.04 allegedly violated by Dr. Moore were specified by the prosecution, in its statement "in the nature of a Bill of Particulars," as subparagraphs (a) and (c). App. 36.

The language relied on from subparagraph (a) is:

> "A prescription for a controlled substance to be issued for a legitimate medical *purpose* by an individual practitioner acting in the usual course of his professional practice." *Id.* (Emphasis supplied.)

Under the government's own view of the evidence it introduced, Dr. Moore cannot be held to have violated the quoted portion of subparagraph (a). Taking, first, the latter part of the language, there can be no question that all the evidence proved that Dr. Moore was indeed acting in the usual course of *his* practice. What the Government's evidence proved in this regard was that what Dr. Moore did was *his* regular and constant practice; although it might not have been done in the usual course of the practice of *other* doctors. The regulation, however, speaks only of *his* practice. The clear intent of the language in question was not to dictate to a registered physician how he must employ narcotics in treating his patients, but merely to prevent him from using the device of a prescription to effect transfers of narcotics outside "the legitimate distribution chain," from registered pharmacists to unregistered drug pushers. The government cannot claim that Dr. Moore violated the regulation simply because it would have been unusual for other doctors, in the course of *their* practice, to have issued prescriptions for methadone in similar circumstances.

Turning, now, to the first part of the quoted language, requiring the prescription to have been issued "for a legitimate medical purpose," the government contended in the trial court that Dr. Moore prescribed methadone to his patients in quantities calculated to maintain them in their drug addiction and that the only legitimate purpose for which the law authorized prescription of methadone to patients was to detoxify them of drugs.[14] There is, however, nothing in subparagraph (a) of the regulation to show that maintenance of a drug-addicted patient on methadone is not a legitimate medical purpose [15] or that the only legitimate medical purpose is detoxification. Nor is such a distinction as to legitimacy suggested anywhere else either in the statute or in Regulation 306, with the exception of language quoted by the government from subparagraph (c) of Regulation 306.04, to which we now turn.

---

[14] The court of appeals did not reach this issue. "We do not decide under what circumstances, if any, an individual such as appellant could lawfully administer a methadone maintenance program. Nor do we decide whether appellant was in fact maintaining addicts, detoxifying them, or simply pushing drugs." 505 F.2d, at 429.

[15] Although the administrative and other problems involved in a program of methadone maintenance are many and difficult, there can be little doubt that of all the techniques for drug-addiction treatment thus far developed by the medical profession, methadone maintenance is the most effective. See *New Perspectives on Urban Crime*, a report by the American Bar Association Special Committee on Crime Prevention and Control (1972), pp. 52-57. It would seem, therefore, that whatever imperfections there may have been in Dr. Moore's treatment of his patients, his undertaking to maintain them on methadone was at least a "legitimate medical purpose."

The language of Regulation 306.04(c) relied on below was:

> "A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the purpose of continuing his dependence upon such drugs." App. 36

Although the Assistant United States Attorney was frank to state to the court that he was reading only part of the subparagraph, what was not read was the most significant part, for it makes the regulation totally inapplicable to Dr. Moore. The omitted language, with a comma substituted for the period after "drugs," reads as follows:

> ". . . in the course of conducting an authorized clinical investigation in the development of a narcotic addict rehabilitation program."

The clear and obvious effect of subparagraph (c) is that registrants who have been authorized to conduct investigations for development of a program for rehabilitation of addicts may engage in methadone maintenance but only by on-the-spot administration of the drug. Presumably, dispensing the drug by prescription is deemed undesirable in such circumstances. It is equally clear that the subparagraph can have no possible application to the individual medical practioner who is clearly authorized to employ prescriptions generally (see Regulation 306.03) and who does so for a therapeutic, not investigative, purpose.

The Harrison Narcotic Act Cases

The government, in its brief in this Court, relies on a line of cases under the Harrison Narcotic Act of 1914, 26 U.S.C. § 4701 *et seq,* to sustain the conviction in this case. The cases under that Act are not dispositive.

As the court of appeals observed, the Controlled Substances Act is fundamentally different from the Harrison Narcotic Act. 505 F.2d, at 431. The legislative history indicates that the Controlled Substances Act replaced the Harrison Narcotic Act single penalty provision with a series of penalty provisions specifically designed to treat registered and unregistered indivduals differently. *Id;* and see fn. 10, *supra;* see also *United States* v. *Rosenberg,* — F.2d —, No. 74-2197 (9th Cir. 1975), Sl. op. 23, *et seq* (Ely, J., dissenting).

The House version of the Act was passed in lieu of the Senate bill. The accompanying House Report *expressly* highlighted the need for new legislation in light of the Harrison Act's inadequacies. H. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code Cong. and Adm. News (1970), pp. 4580-81. The Report explicitly referred to this Court's own acknowledgment that the earlier Act was passed without consideration of the addiction problem. The Court had observed in *Linder* v. *United States,* 268 U.S. 5, 18 (1925), that the "declared object" of the Harrison Act was to provide revenue and that it:

> "says nothing of 'addicts' and does not undertake to prescribe methods for their treatment."

The House Report underscored that inadequacy. It acknowledged the observation that "[o]ut of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts . . . ," and went on to propose that the new legislation authorize new guidelines which would minimize the inhibitions that Harrison Act prosecutions had generated.

> "Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of the practice of medicine, it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecutions of physicians whose methods of prescribing narcotic drugs have not conformed to the opinions of Federal prosecutors of what constitutes appropriate methods of professional practice. U.S. Code Cong. and Adm. News, p. 4581."

It was one of the principal objects of the Controlled Substances Act to clarify for physicans "the extent to which they may safely go in treating narcotic addicts as patients." *Id.,* at 4580. Such a legislative object is fully appropriate in light of modern hypotheses as to addiction treatment. These hypotheses now respectably include, as they did not in the Harrison Narcotic Act era, the use of narcotics themselves for curative, as distinguished from mere comforting, purposes. This development was relatively unknown in the 1920's when the leading cases under the Harrison Narcotic Act were decided.[16] And it calls for an expanded concept of medical addiction practice under new kinds of controls.

Indeed, the legislative history of the Controlled Substances Act considered this very problem. Quoting at length from both the Prettyman Commission of 1963[17] and the Katzenbach Commission of 1967,[18] the House Report noted:

> "Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly per-

[16] *Jin Fuey Moy* v. *United States,* 254 U.S. 189 (1920); *United States* v. *Behrman,* 258 U.S. 280 (1921).

[17] The President's Advisory Commission on Narcotics and Drug Abuse.

[18] The President's Commission on Law Enforcement and Administration of Justice.

mitted a physician to prescribe narcotic drugs for a patient in the course of 'professional practice only' and for 'legitimate medical uses' and 'legitimate medical purposes.' Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a patient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.

"During the first 10 years following enactment of the Harrison Act, the Supreme Court affirmed several convictions under the act involving the indiscriminate prescribing of narcotic drugs for addicts. In 1925, however, in *Linder* v. *United States,* 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, the Court indicates that the dispensing of narcotic drugs by a physician for the purpose of relieving conditions incident to addiction was not in every instance a violation of the act. . . .

"The regulations of the Bureau of Narcotics, however, do not seem to be in accord with [Linder] . . .

"The practicing physician has thus been confused as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients." H. Rept. No. 91-1444, U.S. Code Cong. and Adm. News (1970), at p. 4580.

The Controlled Substances Act responded to these needs with the concept of a "legitimate distribution chain" whose abuses would be policed primarily by administrative rather than criminal sanctions. That

concept lies behind the carefully drawn categories which distinguish Section 841 control from measures authorized in Section 842 and 843. Precedents drawn from an earlier regime, under a statute not addressed to the addiction problem, can hardly be taken as dispositive of the issues raised under the new statutory categories. To do so is to emasculate the point of the enactment.

The Cases from Other Circuits

The government's brief notes, Pet. Br., p. 44, that the court below stands alone in having held that the felony provisions of Section 841 are inapplicable to a licensed physician registered with BNDD. *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973); *United States* v. *Collier,* 478 F.2d 268 (5th Cir. 1973); *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973); *United States* v. *Bartee,* 479 F.2d 484 (10th Cir. 1973); *United States* v. *Jobe,* 487 F.2d 268 (10th Cir. 1973); *United States* v. *Larson,* 407 F.2d 385 (9th Cir 1974); *United States* v. *Green,* 511 F.2d 1062 (7th Cir. 1975); *United States* v. *Rosenberg,* —— F.2d ——, No. 74-2197 (9th Cir. 1975). One cannot, however, simply enumerate these cases and conclude from that enumeration that the opinion of the court below is an aberration that stands athwart the judicial mainstream.

One must, first of all, distinguish between the pre-*Moore* cases and the post-*Moore* cases. Of the cases enumerated in the preceding paragraph, only *Green* and *Rosenberg* are post-*Moore* cases.

Turning to the pre-*Moore* cases, it is at once apparent that none appear even to have considered the legislative history of the Controlled Substances Act. Nor, indeed, do they appear to have considered the

precise argument made in and adopted by the court below. This point was most cogently made in the most recent of the post-*Moore* cases in which the prevailing opinion noted:

> "Apparently only Dr. Moore has thought that section 841 did not apply to registered doctors. This argument is not among the many arguments made by Dr. Rosenberg [the appellant], and its does not seem to have been made before any other court, ... *United States* v. *Rosenberg,* F.2d , No. 74-2197 (9th Cir. 1975), Sl. op. 9, fn. 9.

This statement in *Rosenberg* is accurate. The reasoning in *Bartee* rested upon an agreement of the parties. 479 F.2d, at 488. Moreover, there is no suggestion in the *Bartee* opinion that the physician there involved was registered with BNDD. Two other pre-*Moore* cases, *Leigh* and *Jobe,* rely solely upon *Bartee* and contain no independent analyses. 487 F.2d, at 269; 487 F.2d, at 207.

The only argument made in *Collier* was as to "the constitutionality of 21 U.S.C. § 841(a)(1) as applied to physicians." 478 F.2d, at 270. While *Badia* does appear to address the question which is here involved, 290 F.2d, at 297, there is no analysis of the legislative history in the opinion and it does not appear to have been presented to the court. Finally, *Larson,* too, relies solely upon *Bartee,* 507 F.2d, at 387 *et seq.,* does not reflect that the physician there involved held a BNDD registration and, perhaps most importantly, has recently lost one judicial adherent. Judge Ely, who participated in the *Larson* affirmance, dissented in *United States* v. *Rosenberg,* F.2d , No. 74-2197 (9th Cir. 1975), and wrote:

> "I was a member of the panel of this Court that decided *Larson,* wherein we unanimously affirmed the section 841 conviction of a licensed physician on facts similar to those presented here. Because of the more searching inquiry prompted by the briefs and arguments in this case and by the decision in *Moore,* I am now convinced that our decision in *Larson* was wrong. I regret, of course, that I cannot now undo my judicial mistake in respect to *Larson.*" Sl. op., 21, fn. 7.

The post-*Moore* cases of *Green* and *Rosenberg* are the only ones thoroughly to consider the statutory analysis made in *Moore.* The convictions in *Green* and *Rosenberg* were affirmed with Judge Ely dissenting in *Rosenberg.* With all due respect to the judges in the *Rosenberg* majority, Dr. Rosenberg simply did not argue that "section 841 did not apply to registered doctors. This argument is not among the many arguments made by Dr. Rosenberg, . . . " *Id.,* sl. op. 9, fn. 9. He argued the unconstitutionality of the statute, the violation of his right against self-incrimination and the sufficiency of the evidence *Id.,* sl. op. 1-2. And in *Green,* even though affirming the conviction, the court "agree[d] with the *Moore* majority that Congress in some respects intended to treat physician-registrants differently from non-registrants." 511 F.2d, at 1067. The *Green* court did not "agree however, that registrants were to be totally immune from the sanctions imposed by section 841." *Id.* To the extent that *Green* and *Rosenberg* considered the statutory analysis here made, and adopted by the court below, the Respondent respectfully submits that those courts erred in their conclusion. "[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal*

C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). This is the test applied by the court below to a complex statutory scheme.[19] The Respondent submits that the court of appeals was correct in its analysis of the statute and of its legislative history.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the court of appeals should be affirmed. Alternatively, should this Court disagree with the statutory analysis contained in the prevailing opinion of the court below, the case must be remanded for consideration by that court of issues which it did not reach —including, *inter alia,* the propriety of the doubled sentences and the consecutive nature thereof (see fn. 8, *supra*), the adequacy of the trial court's instructions and those points noted in fn. 13 and 14, both *supra.*

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July 1975

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[19] The confusing nature of the statutory scheme is perhaps best revealed by a footnote in *United States* v. *Badia,* 490 F.2d, at 298, fn. 4:

> "We acknowledge that this interpretation of the statutory scheme conflicts with the recent decision of the Fifth Circuit in United States v. Leigh, 487 F.2d 206 (5th Cir. 1973) . . . . It should also be noted that *Leigh* seemingly conflicts with the prior Fifth Circuit decision in *Collier, supra,* . . ."

And see *United States* v. *Jobe,* 487 F.2d, at 269 ("The statute is not a model of clarity in this respect, . . .".).

Supreme Court, U. S.
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No. 74-759

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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INDEX

Cases: Page

Jin Fuey Moy v. *United States*, 254 U.S. 189 4, 12
Linder v. *United States*, 268 U.S. 5 12
United States v. *Behrman*, 258 U.S. 280 12
United States v. *Carroll*, 518 F. 2d 187 15
United States v. *Grimaud*, 220 U.S. 506 9
United States v. *Norman*, C.A. 9, No. 74–2465, decided August 6, 1975 15
United States v. *Rosenberg*, 515 F. 2d 190 15
Webb v. *United States*, 249 U.S. 96 12

Statutes, regulations and rule:

Comprehensive Drug Abuse Prevention and Control Act of 1970, Title I, Section 4, 84 Stat. 1241, 42 U.S.C. 257a 3

Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, 84 Stat. 1242 (Controlled Substances Act), 21 U.S.C. 801, *et seq.*:

Sec. 802(10) 9
Sec. 802(20) 9
Sec. 821 8
Sec. 822(b) 14
Sec. 823(f) 5
Sec. 824 5
Sec. 829 8, 13, 14, 15
Sec. 829(a) 12
Sec. 829(b) 12
Sec. 841 3, 4, 6, 9, 13, 14, 15
Sec. 841(a) 9, 12, 15

593-802—75——1

Statutes, regulations and rule—Continued

	Page
Sec. 841(a)(1)	10, 15
Sec. 842	13, 14, 15
Sec. 842(a)(1)	14
Sec. 845	15, 16
Sec. 871(b)	8
Narcotic Addict Treatment Act of 1974, Pub. L. 93–281, 88 Stat. 124–125:	
21 U.S.C. 823(g), 88 Stat. 124	5
21 U.S.C. 824, 88 Stat. 125	5
21 U.S.C. 827(c)(1)(A), 88 Stat. 125	4
21 C.F.R. Part 306 (1973)	7, 13
21 C.F.R. 306.01	8
21 C.F.R. 306.04	7, 8, 9, 13, 15
21 C.F.R. 306.04(a)	10, 14
21 C.F.R. 306.04(c)	7, 10
21 C.F.R. 306.11–306.32	14
21 C.F.R. 1306.04 (1974)	7
21 C.F.R. 1306.04(c) (1975)	7
Fed. R. Crim. P., Rule 7(f)	11
Miscellaneous:	
116 Cong. Rec. 978 (1970)	3
H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. (Part 1) (1970)	2, 14
The President's Advisory Commission on Narcotic and Drug Abuse (1963)	1, 2
The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967)	1, 2
S. Rep. No. 93–192, 93d Cong., 1st Sess. (1973)	5, 6

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent argues (Brief, pp. 20–23) that decisions of this Court under the Harrison Narcotic Act should be disregarded because the Controlled Substances Act is "fundamentally different," in that under the new Act abuses by those in the "legitimate distribution chain" are to be policed "primarily by administrative rather than criminal sanctions." He relies in part upon the reports of the Prettyman Commission[1] and the Katzenbach Commission,[2] both of

[1] The President's Advisory Commission on Narcotic and Drug Abuse (1963).

[2] The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967).

which were cited in the House Report on the Controlled Substances Act. See H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. (Part 1) 16 (1970).

Both Commissions noted the reluctance of physicians under the Harrison Narcotic Act to dispense drugs in the legitimate treatment of narcotic addicts for fear of offending "the opinions of Federal prosecutors of what constitutes appropriate methods of professional practice." H.R. Rep. No. 91–1444, *supra,* at 15. However, both the Commissions and Congress presumed that a physician who treats addicts would act in good faith in accordance with elementary precautionary standards of medical practice. Nothing in the reports indicates that Congress or the Commissions intended to bar all criminal prosecutions of entire classes of persons such as registrants, practitioners, physicians or pharmacists, as respondent suggests.

The Katzenbach Commission expressly recognized that if a physician were to depart from accepted standards of medical practice and were to act "without the pretense of treatment, or a bona fide physician-patient relationship * * * he would clearly have violated the law." Katzenbach Commission, *supra,* at 19. Similarly, the Prettyman Commission, *supra,* at 56, and the House Report noted this Court's decisions under the Harrison Act that "the indiscriminate prescribing of narcotic drugs for addicts" was criminally punishable. H.R. Rep. No. 91–1444, *supra,* at 14. Thus, there is no basis in the reports of the Commissions or in the House Report for respondent's argument that Congress intended to exempt registrants or practi-

tioners as a class from prosecution under Section 841 of the Controlled Substances Act.[3]

The Prettyman and the Katzenbach Commissions both recommended action by Congress to reduce the "gray area" in the legitimate medical treatment of addicts which had made even those physicians who were honestly attempting to comply with accepted medical standards reluctant to treat addicts. Congress responded, not by enacting Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. 801, *et seq.,* (the Controlled Substances Act) involved in this case, but by enacting Title I, specifically Section 4, 84 Stat. 1241, 42 U.S.C. 257a, which provides:

> The Secretary of Health, Education, and Welfare, after consultation with the Attorney General and with national organizations representative of persons with knowledge and experience in the treatment of narcotic addicts, shall determine the appropriate methods of professional practice in the medical treatment of the narcotic addiction of various classes of narcotic addicts, and shall report thereon from time to time to the Congress.

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[3] Indeed only the House Report makes reference to the Prettyman and Katzenbach Commissions. The Senate Judiciary Committee did not mention either Commission, and the sponsor of the Senate bill, Senator Dodd, while alluding to the need for separate legislation for treatment of addicts, stated:

"But it cannot be overemphasized that the bill before the Senate today is entirely concerned with enforcement.

"It contains no medical or rehabilitative provisions.

"It is designed to crack down hard on the narcotics pusher and the illegal diverters of pep pills and goof balls." (116 Cong. Rec. 978 (1970).

The Commissions did not recommend, and Congress did not adopt, a change in the law so drastic as to exempt from prosecution those with the greatest access to controlled substances, physicians and pharmacists, when they distributed drugs indiscriminately and without medical justification. In the absence of such an expressed congressional intent, prior decisions of this Court under the Harrison Act demonstrate that drug trafficking physicians are not immune from prosecution under Section 841 of the Controlled Substances Act.[4]

2. Respondent also relies upon (Brief, p. 11) the recently enacted Narcotic Addict Treatment Act of 1974 (NATA), Pub. L. 93–281, 88 Stat. 124, as evidence that Congress intended to deal with registrants through a system of administrative controls rather than penal sanctions. But NATA was enacted after the events in question in this case. Moreover, there is no indication in NATA itself or in its legislative history that Congress had intended to exempt practitioners from criminal punishment under the Controlled Substances Act when they distribute for illicit purposes.

The purpose of NATA was to strengthen the ad-

[4] Indeed, respondent's conduct, as described in his own brief in this Court (pp. 4–5), is strikingly similar to the conduct held to have violated the Harrison Act in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192–194.

[5] NATA imposed additional administrative controls on the registration of practitioners who dispense narcotic drugs to individuals for maintenance or detoxification treatment, by subjecting them to the same record-keeping and reporting requirements as non-physician registrants (21 U.S.C. 827(c)(1)(A), as amended, 88 Stat. 125), and by requiring of them a separate annual registration from the Attorney General, who must find that they will comply with standards established by him for these forms of treatment (21 U.S.C. 823(g), 88 Stat. 124). Previously, practitioners were entitled of right to registration if authorized to dispense under the law of the state in which they practiced. See 21 U.S.C. 823(f).

Similarly, NATA permits suspension or revocation of a registration to dispense for maintenance or detoxification "upon a finding that the registrant has failed to comply with any" of the aforementioned standards (21 U.S.C. 824, as amended, 88 Stat. 125). Previously, the Attorney General could revoke a registration only if the registrant had lost his state license, falsified an application or committed a drug-related felony. See 21 U.S.C. 824.

ministrative capability of the government to control a specific form of medical practice—treatment of drug addiction by detoxification or maintenance, principally using methadone. S. Rep. No. 93–192, 93d Cong., 1st Sess. 4 (1973).[5] The Act did not amend the Controlled Substances Act with regard to the distribution of methadone and other controlled substances for purposes not specifically designed for detoxification or maintenance, nor did it alter the criminal penalty provisions in any way. It therefore provides no more evidence than does the Controlled Substances Act itself of a congressional intent to deal with registrants solely through administrative controls rather than through the imposition of criminal sanctions in appropriate cases.

Moreover, by indicating that the impetus for the additional administrative remedies established by NATA was the difficulty of proving criminal conduct on the part of practitioners purporting to engage in unorthodox forms of detoxification or maintenance of addicts, Congress acknowledged that practitioners

may be prosecuted under Section 841. For example, the Senate Judiciary Committee recognized that the new "treatment modalities" of methadone maintenance and detoxification had increased the opportunity for the diversion of methadone into the illicit market (S. Rep. No. 93–192, *supra,* at 4), and that a principal source of that diversion was careless or unscrupulous physicians (*id.* at 6–7). It noted the difficulties inherent in proceeding criminally against such physicians masquerading behind the appearance of legitimacy afforded them by these new methods of treatment (*id.* at 12–14) and the inability "to take successful criminal action against profiteering practitioners except in the most aggravated of circumstances * * *" (*id.* at 13). The report specifically referred to respondent as the illustration of the exception, saying: "One of the most notorious cases is that of Dr. Thomas Moore who operated a 'methadone program' in the District of Columbia until his final conviction of illegal distribution of methadone on an indictment alleging 38 separate counts" (*id.* at 7).[6]

Against this background, NATA, like the Controlled Substances Act itself, is a further recognition by Congress that administrative and criminal

[6] Prosecution in such cases had been time-consuming, requiring "prolonged effort to make undercover penetrations" (S. Rep. No. 93–192, *supra*, at 13); and during this prosecutorial effort, registrations could not be suspended or revoked because of the limited grounds the Controlled Substances Act provided for suspension and revocation. Respondent was specifically named as a "dangerous profiteer" against whom the Attorney General "could have moved * * * far more expeditiously" if he had possessed broader

sanctions must be used in a complementary fashion to stem the illicit diversion of controlled substances by unscrupulous practitioners. NATA merely reemphasized Congress' belief that the war against drug diversion had to be waged on both fronts. See S. Rep. No. 93–192, *supra,* at 13–14.

3. Respondent makes several contentions with respect to 21 C.F.R. 306.04 (1973).[7] That regulation is contained in Part 306 (now Part 1306) of Title 21 of the Code of Federal Regulations, which "govern[s] the issuance, filling and filing of prescriptions pursu-

power to revoke registrations (*id.* at 7). Moreover, when a maintenance program that was a source of illicit street drugs had been terminated by the threat of prosecution, the physician then often emerged as the operator of a detoxification program which, under prior law, was not subject to the same kind of federal regulations as were maintenance programs (*id.* at 12). Again, respondent was named as the "most notorious example of this type of maneuver" (*ibid.*). Finally, prosecution had been deterred by "the intricate and nearly impossible burden of establishing what is beyond 'the course of professional practice' for criminal law purposes when * * * a practitioner speciously claims that the practices in question were ethical and humanitarian in nature" (*id.* at 14).

[7] 21 C.F.R. 306.04 (1973) provided in pertinent part:

"(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided

ant to section 309 of the Act (21 U.S.C. 829) * * *." 21 C.F.R. 306.01. Section 306.04, along with the other regulations contained in Part 306, was promulgated by the Attorney General pursuant to his statutory authority "to promulgate rules and regulations * * * relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances." 21 U.S.C. 821. See also 21 U.S.C. 829, 871(b). It is an administrative regulation designed to effectuate the registration and other regulatory provisions of the Controlled Substances Act.

a. Respondent first claims (Brief, pp. 12–15) that by relying upon the regulation as "in the nature of a Bill

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for violations of the provisions of law relating to controlled substances.

* * * * *

"(c) A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs, in the course of conducting an authorized clinical investigation in the development of a narcotic addict rehabilitation program."

The regulation was redesignated 21 C.F.R. 1306.04 in the 1974 revision of Title 21 of the Code of Federal Regulations and remains so designated in the 1975 revision. For convenience and so that it is clear that we are referring to the regulation as it existed at the time of respondent's trial, we will refer to the regulation throughout this brief as 21 C.F.R. 306.04. Similarly references to other pertinent regulations in Title 21 will be to the regulations as they were designated in the 1973 edition of the Federal Code of Regulations. We note, however, that subsection (c), as amended on October 25, 1974, now reads:

"(c) A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule for 'detoxification treatment' or 'maintenance treatment' as defined in Section 102 of the Act" (21 U.S.C. 802).

of Particulars" (App. 37), the government took the position at trial that respondent, although an "authorized" person under 21 U.S.C. 841, violated the regulation and thereby violated Section 841 of the Act. From this premise, he argues that his conviction cannot stand because Congress attached no criminal penalties to the regulation upon which the government relied. Our answer is that the indictment, the evidence, the jury instructions and the verdict in this case all focused on conduct constituting the violation of a specific statute, 21 U.S.C. 841(a), not a regulation.

The Controlled Substances Act itself, not the regulation, creates certain exceptions for "authorized" conduct.[8] Among the conduct the Act authorizes is the dispensing of a controlled substance by a practitioner pursuant to a lawful order and "in the course of professional practice." See 21 U.S.C. 802(10), 802(20). 21 C.F.R. 306.04 simply restates this statutory limitation. It does not, as respondent intimates, attempt to make punishable conduct that the statute

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[8] Contrary to respondent's assertion, the government's theory at trial was not that, although he may have been an "authorized" *person* within the meaning of Section 841, respondent violated 21 C.F.R. 306.04 and thereby violated Section 841. The government did not concede at trial that respondent was an "authorized" person under Section 841. Its theory then, as now, was that Section 841 does not exempt from criminal prosecution a class of persons (registrants) but rather exempts certain "authorized" *conduct* by, *inter alia*, practitioners who dispense drugs "in the course of professional practice." Sec. 21 U.S.C. 802(10), 802(20). When a practitioner distributes other than in the course of professional practice, he exceeds his authorization, is no longer a practitioner authorized to dispense under the Act and is thus punishable under Section 841 like anyone else.

itself does not proscribe or itself impose criminal liability on distributing for unauthorized purposes.

Rather, by authorizing the prescription of controlled substances only "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" (21 C.F.R. 306.04), the regulation does not "go outside of the circle of that which the [Controlled Substances] Act itself [has] affirmatively required to be done, or treated as unlawful if done." *United States* v. *Grimaud*, 220 U.S. 506, 518. Thus, it is the statute and not the regulation that makes respondent's conduct punishable.

Because 21 C.F.R. 306.04 restated and explicated the statutory standard "in the course of professional practice," it served as a useful partial "bill of particulars" in describing the government's theory to the trial court and to respondent and his counsel.[9] How-

[9] In brief, the government's theory was that respondent had issued methadone prescriptions other than for purposes of detoxification, that such issuance was not in the course of legitimate professional practice and that respondent thereby violated 21 U.S.C. 841(a)(1). 21 C.F.R. 306.04(a) restates the doctor's authority to dispense through prescriptions, which must "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." The government contended that "the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and * * * that he was not acting in the usual course of his professional practice" (App. 36). The prosecutor also made reference to language in 21 C.F.R. 306.04(c) and advised the court that the government intended to prove that respondent "was not issuing * * * prescriptions to detoxify [addicts], but retaining them as drug addicts" (App. 36–37).

The prosecutor's statement of his theory was made at a pretrial hearing more than one month before jury selection and commencement of the trial. The jury was never made aware of

ever, the issue before the jury was whether respondent had violated the Controlled Substances Act, not merely a regulation, by conduct which was contrary to any bona fide professional medical practice. As the court of appeals acknowledged (Pet. App. 3a–4a), the government's proof was intended to show that respondent had prescribed methadone in a manner contrary to any legitimate method of treating addiction, whether by detoxification or maintenance; and the prosecution's evidence did not demonstrate solely that respondent violated the regulation or the terms of his registration, "but much more broadly [that] his alleged activities [were] outside the 'usual course of [professional] practice' " (Pet. App. 8a, n. 18).[10]

Thus the question for the jury was whether respondent had distributed controlled substances other than in good faith for treatment and outside the usual course of professional practice. As we explained in

the theory as embodied in the prosecutor's statement to the court. Moreover, the prosecutor had no advance notice that he was going to be required to make a statement of his theory at the hearing. Indeed, although respondent's counsel had previously announced his intention to file a motion for a bill of particulars, he in fact never made such a motion (see July 13, 1972 Tr. 8–9), and therefore a bill of particulars was never filed. Compare Rule 7(f), Fed. R. Crim. P.

[10] The government's evidence was designed to show not that respondent had prescribed methadone pursuant to an otherwise bona fide maintenance program, but that he had prescribed contrary to *any* legitimate treatment method, whether detoxification or maintenance. See, *e.g.*, App. 80–83, 88, and our brief, pp. 10–13. Expert testimony at trial demonstrated that respondent's conduct did not constitute "acceptable medical practice" for either the detoxification or maintenance of addicts. App. 78–90.

our main brief (pp. 20–26, 33–38) this is the statutory standard for practitioners under 21 U.S.C. 841(a).[11]

There is no meaningful distinction, as respondent claims (Brief, p. 17), between the statutory standard "in the course of professional practice" and the phrase "in the usual course of his professional practice" in the regulation. Neither Congress nor the Attorney General intended the standard of authorized dispensing to depend on the subjective views of a practitioner as to what constitutes legitimate medical practice. Moreover, the fact that the word "his" was used to modify "professional practice" in the Harrison Narcotic Act did not prevent this Court in the past from concluding that the standard of authorized dispensing turned on an objective assessment of the facts and circumstances and not on the opinion of a particular physician. For the "[m]ere pretense of [professional] practice * * * cannot legalize forbidden sales." *Linder* v. *United States,* 268 U.S. 5, 18. See also *United States* v. *Behrman,* 258 U.S. 280, 287; *Jin Fuey Moy* v. *United States,* 254 U.S. 189, 194; *Webb* v. *United*

[11] Respondent's claim (Brief, pp. 17–19), that the government failed to prove that he had violated the regulation, is therefore irrelevant. For, as we have shown, he was charged with and convicted of having violated a statute, not a regulation. Respondent has neither alleged nor demonstrated that the government's reference to the regulation, in outlining its theory of the case, out of the presence of the jury and well before trial, prejudiced him in the preparation or presentation of his defense. Indeed, since the standard in the regulation is precisely that contained in the statute, respondent had adequate notice of the conduct proscribed by the statute and the proof against which he would have to defend.

States, 249 U.S. 96, 99–100. Finally, the trial judge gave sufficient consideration to differing theories of what constitutes legitimate dispensing by instructing the jury that respondent was required to make only an "honest effort" to comply with accepted medical standards (App. 124).[12]

b. Respondent also contends (Brief, p. 16) that because 21 C.F.R. 306.04 was promulgated in order to implement 21 U.S.C. 829, and because violations of Section 829 are specified in Section 842, not Section 841 of the Controlled Substances Act, he was liable for a maximum one-year sentence under Section 842 for violating the regulations. However, 21 U.S.C. 829 merely establishes formal requirements for the issuance of prescriptions by pharmacists.[13] It does not impose—but rather presupposes— the requirement that a prescription must be issued by a phy-

[12] The trial judge instructed the jury that to convict respondent it must find that he dispensed or distributed "other than in good faith for detoxification" (App. 123). Respondent did not object to this instruction. See Tr. V 67–69, 71–79 and our brief at p. 6, n. 10. Moreover, as the court of appeals found (Pet. App. 3a), respondent's defense at trial was not that he had prescribed for maintenance rather than detoxification, but "that he prescribed methadone in good faith for detoxification." See also Tr. IV 649. He could not be prejudiced by an instruction by the court tailored to this defense, and, as we noted, one to which he did not object.

[13] Subsection (a) provides that "[e]xcept when dispensed directly by a practitioner other than a pharmacist, to an ultimate user, no controlled substance in schedule II * * * may be dispensed without the *written* prescription of a practitioner * * *" (emphasis added). Subsection (b), in turn, declares that a schedule III or IV controlled substance may not be dispensed (except directly by a physician) without either "a written or oral prescription."

sician in the course of his professional practice for a legitimate medical purpose. That requirement, as we explained in our main brief, is imposed by Sections 841 and 822(b) by reference to the "other provisions" of the Act, including the statutory definition of a "practitioner." Section 842(a)(1), on the other hand, penalizes "more or less technical violations" (H.R. Rep. No. 91–1444, *supra*, pp. 10–11) of the formal requirements of when a written rather than an oral prescription is required by Section 829.[14]

Similarly, Part 306 of Title 21, Code of Federal Regulations, is concerned with the differing formal requirements in the issuance of written and oral prescriptions by pharmacists. See 21 C.F.R. 306.11 through 306.32. Violation of such requirements subjects one to the penalties of 21 U.S.C. 842. At the same time, however, 21 C.F.R. 306.04(a), which the government used as "in the nature of a Bill of Particulars," contains the directive that "[a]n order * * * issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and the person * * * issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." The regulation thereby gives notice to practitioners that a prescription issued other

[14] Any other interpretation of Section 829 in its relation to the penal sections of the Act would lead to the absurd result (noted in our main brief, at page 30) that a practitioner who sold or gave schedule II–IV drugs directly to persons for an illicit purpose rather than wrote prescriptions for the drugs would not be punishable at all under the Act, since Section 829 deals only with prescriptions.

than for a legitimate medical purpose—even if in compliance with the formal requirements of Section 829—is conduct unauthorized by the Controlled Substances Act, is not within its protection and subjects the issuer to punishment for unauthorized distribution under 21 U.S.C. 841. Thus, contrary to respondent's assertion, 21 C.F.R. 306.04 does not limit the punishment of registrants who wrongfully prescribe controlled substances to the misdemeanor penalties of 21 U.S.C. 842.[15]

4. Finally, respondent argues (Brief, p. 6, n. 8) that even should this Court disagree with the conclusion of the court of appeals concerning respondent's immunity from prosecution under 21 U.S.C. 841(a), the case must be remanded to that court to consider whether respondent was properly sentenced under 21 U.S.C. 845, a statute which provides that where a person over 18 sells to a person under 21, punishment for a first offense may be twice that otherwise prescribed. Since the court of appeals did not reach that question and (unlike respond-

[15] As we pointed out in our main brief at page 44, the District of Columbia Circuit is alone in having concluded that physicians and other practitioners are immune from prosecution under Section 841 of the Controlled Substances Act. Since the filing of our brief, the Sixth Circuit has implicitly joined the First, Fifth, Seventh, Ninth and Tenth Circuits in concluding that physicians and other practitioners are not immune from prosecution under 21 U.S.C. 841. See *United States* v. *Carroll*, 518 F. 2d 187 (C.A. 6). Moreover, following its opinion in *United States* v. *Rosenberg*, 515 F. 2d 190, the Ninth Circuit has held that pharmacists, like physicians and other practitioners, are not immune from prosecution under 21 U.S.C. 841(a)(1). See *United States* v. *Norman*, C.A. 9, No. 74–2465, decided August 6, 1975.

ent's arguments with respect to the regulation) it is not integrally related to the issue upon which this Court granted certiorari, we agree that a remand will be necessary.

Accordingly, the judgment of the court of appeals should be reversed and the case remanded to that court for the sole purpose of considering whether respondent was properly sentenced under 21 U.S.C. 845 for distributing a controlled substance to persons under 21 years of age.

Respectfully submitted.

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